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J. C.

P.V.

IN THE
**SUPREME COURT OF THE
UNITED STATES**

No. Original

October Term, 1941

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In the Matter of the Petition of the State of Texas and the Railroad Commission of Texas, and Ernest O. Thompson, Jerry Sadler, and Olin Culberson, members of the Railroad Commission of Texas, and Gerald C. Mann, Attorney General of Texas, for a writ of mandamus in the nature of procedendo against the Honorable James P. Alexander, Chief Justice, and the Honorable Richard Critz and the Honorable John H. Sharp, Associate Justices, of the Supreme Court of Texas.

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MOTION FOR LEAVE TO FILE PETITION; PETITION FOR A WRIT OF MANDAMUS IN THE NATURE OF PROCEEDENDO; SUPPORTING BRIEF; AND APPENDIX OF EXHIBITS.

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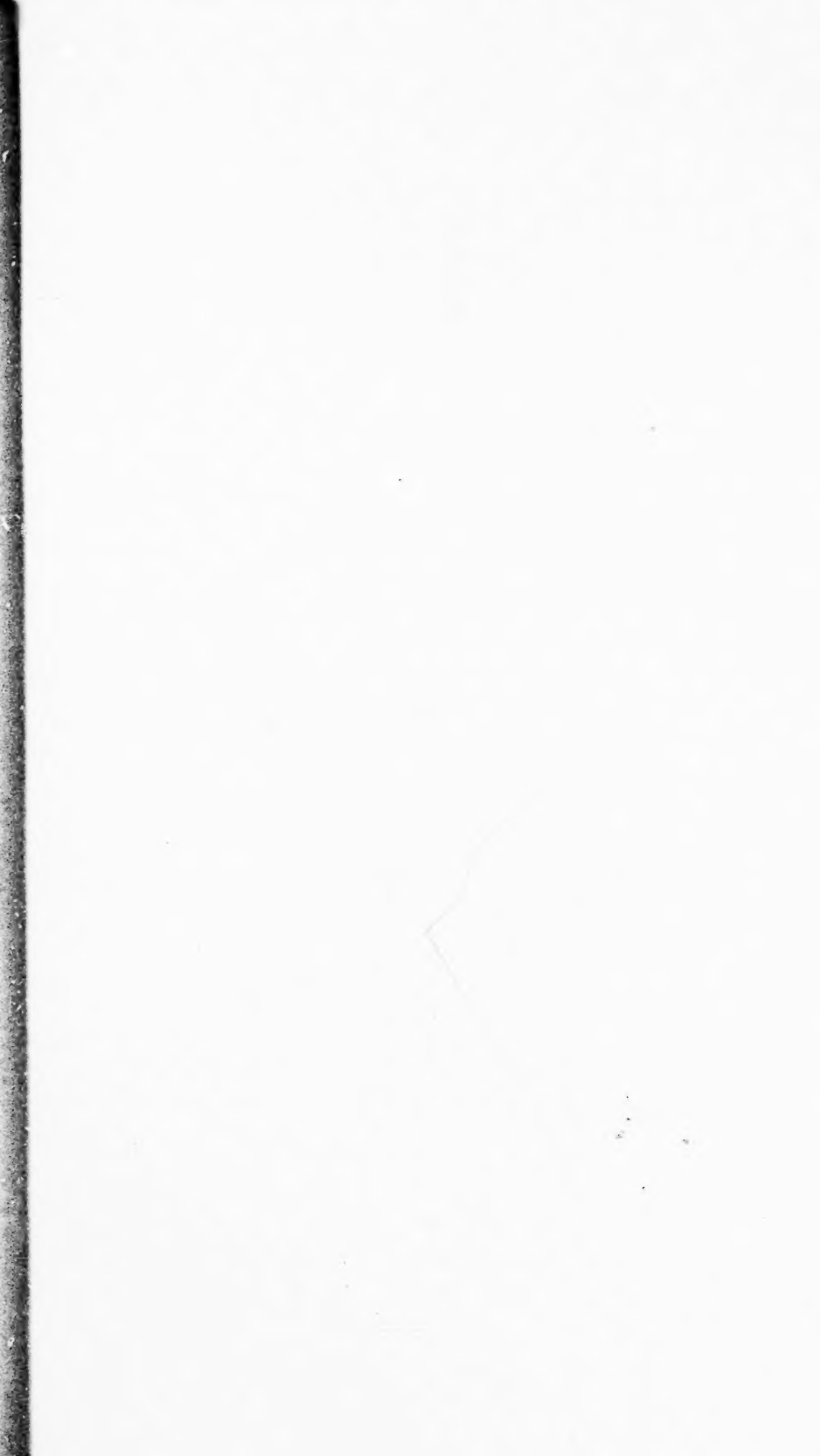
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IN THE
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October, Term, 1941.

In the matter of the petition of the State of Texas and the Railroad Commission of Texas, and Ernest O. Thompson, Jerry Sadler, and Olin Culberson, members of the Railroad Commission of Texas, in their official and individual capacities, and Gerald C. Mann, Attorney General of Texas, in his official and individual capacities, for a writ of mandamus in the nature of procedendo against the Honorable James P. Alexander, Chief Justice, and the Honorable Richard Critz and the Honorable John H. Sharp, Associate Justices, of the Supreme Court of Texas, in their official capacities as Chief Justice and Associate Justices of the Supreme Court of Texas.

To The Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now comes Gerald C. Mann, Attorney General of the State of Texas, on behalf of the State of Texas and the Railroad Commission of Texas, and Ernest O. Thompson, Jerry Sadler, and Olin Culberson, members of the Railroad Commission of Texas, in their official and individual capacities, and on behalf

of himself, Gerald C. Mann, Attorney General of Texas, in his official and individual capacities and moves the court for leave to file the petition for a writ of mandamus in the nature of procedendo hereto annexed and further moves the court that an order and rule be entered and issued directing the Honorable James P. Alexander, Chief Justice, and the Honorable Richard Critz and the Honorable John H. Sharp, Associate Justices of the Supreme Court of Texas, in their capacities as Chief Justice and Associate Justices of the Supreme Court of Texas, to show cause why a writ of mandamus in the nature of procedendo should not issue against them and each of them in accordance with the prayer of said petition and why your petitioners should not have such other and further relief in the premises as may be just and proper.

GERALD C. MANN,
Attorney General of Texas

JAMES P. HART
Austin, Texas

Attorneys for Petitioners,
The State of Texas, the Rail-
road Commission of Texas
and its Members, and the At-
torney General of Texas.

IN THE
**SUPREME COURT OF THE
UNITED STATES**

OCTOBER TERM, 1941.

No. Original

In the matter of the petition of the State of Texas and the Railroad Commission of Texas, and Ernest O. Thompson, Jerry Sadler, and Olin Culberson, members of the Railroad Commission of Texas, in their official and individual capacities, and Gerald C. Mann, Attorney General of Texas, in his official and individual capacities, for a writ of mandamus in the nature of procedendo against the Honorable James P. Alexander, Chief Justice, and the Honorable Richard Critz and the Honorable John H. Sharp, Associate Justices, of the Supreme Court of Texas, in their official capacities as Chief Justice and Associate Justices of the Supreme Court of Texas.

To The Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now come The State of Texas and the Railroad Commission of Texas, and Ernest O. Thompson, Jerry Sadler, and Olin Culberson, members of the Railroad Commission of Texas, in their official and

individual capacities, and Gerald C. Mann, Attorney General of Texas, in his official and individual capacities, hereinafter called petitioners, and say:

I.

The State of Texas is a sovereign state of the United States of America. The Railroad Commission of Texas is an administrative department of the state government of Texas, organized and existing under the laws of the State of Texas, and located at Austin, Travis County, Texas. Ernest O. Thompson, Jerry Sadler, and Olin Culberson are the duly elected, qualified, and acting members of the Railroad Commission of Texas, are citizens of the State of Texas, and each has an official residence in Austin, Travis County, Texas. Gerald C. Mann is the duly elected, qualified and acting Attorney General of Texas, is a citizen of the State of Texas, and has an official residence in Austin, Travis County, Texas. The Honorable James P. Alexander is the duly elected, qualified and acting Chief Justice of the Supreme Court of Texas, is a citizen of Texas, and has an official residence in Austin, Travis County, Texas. The Honorable Richard Critz and the Honorable John H. Sharp are the duly elected, qualified and acting Associate Justices of the Supreme Court of Texas, are citizens of Texas, and have their official residences in Austin, Travis County, Texas.

II.

The purpose of this petition is to obtain from this

Honorable Court, under the authority of Section 262 of the Judicial Code (28 U.S.C., sec. 377), a writ of mandamus in the nature of procedendo to compel compliance with, and to prevent the misconstruction and evasion of, the opinion and judgment of this Honorable Court, entered on May 16, 1938, as amended May 31, 1938, and on which a mandate was issued June 13, 1938, in No. 313, October Term, 1937, entitled *Lone Star Gas Company v. State of Texas*, et al., in which the opinion of this Honorable Court is reported in 304 U. S. 224. Petitioners, or their predecessors in office, were appellees in said case.

III.

As appears from the record in said case now on file with this Honorable Court, the said case No. 313, October Term 1937, entitled *Lone Star Gas Company v. State of Texas*, et al., was an appeal from the judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas, reversing a judgment of the District Court for the 53rd Judicial District of Texas, and holding that the rate order of the Railroad Commission of Texas, which had been enjoined by the said District Court, was valid. The opinions of the said Court of Civil Appeals, from which said appeal was taken to this court are reported in *State v. Lone Star Gas Company*, 86 S. W. (2d) 484 and 86 S. W. (2d) 506. After the said Court of Civil Appeals reversed and rendered the judgment of the District Court, an application for writ of error

was made to the Supreme Court of Texas, which was refused. An appeal was then taken to this Court, in which the two general grounds of attack on the Railroad Commission's order were that (1) it conflicted with the Commerce Clause of the United States Constitution and (2) was confiscatory of the Gas Company's property in violation of the Fourteenth Amendment. As appears from the records of this Honorable Court, said case was argued before this Honorable Court on March 28, 1938, and was decided May 16, 1938. As further appears from the opinion and judgment of record in this court, this Honorable Court reversed the judgment of the Court of Civil Appeals and remanded the cause "for further proceedings not inconsistent with" the opinion of this Honorable Court. In its opinion, it is respectfully submitted that this Honorable Court held:

(1) The order of the Railroad Commission under attack did not conflict with the Commerce Clause of the Constitution of the United States.

(2) The Court of Civil Appeals erroneously held that the appellant, the Lone Star Gas Company, had not sustained the burden of proof upon the issue of confiscation because it had failed to make "a proper segregation of interstate and intrastate properties and business."

(3) The error of the Court of Civil Appeals in applying an "untenable standard of proof" and in

disregarding the evidence as to the "overall" operations of the appellant, necessitated the reversal of the cause and a remand for further proceedings, in order that a determination of the fact issues by the application of the proper standard of proof might be made by the state courts.

IV.

On May 31, 1938, this Honorable Court overruled the petition for rehearing of the State of Texas, et al., in said cause No. 313, October Term, 1937, (304 U. S. 590) and on June 13, 1938 the mandate of this Honorable Court was issued to the said Court of Civil Appeals, and was received and filed in said Court of Civil Appeals on June 16, 1938.

V.

Upon receipt of the mandate of this Honorable Court, the said Court of Civil Appeals considered the effect which should be given to the said mandate, and, as appears from the opinion of the said Court of Civil Appeals entered on April 12, 1939, (Exhibit A, *infra*, p. 53, *State v. Lone Star Gas Company*, 129 S. W. (2d) 1164), the said Court of Civil Appeals held that the opinion and judgment of this Honorable Court did not deprive the Court of Civil Appeals of the right to determine whether or not the evidence was sufficient to sustain the finding of the jury in the trial court that the rate order attack was confiscatory,

upon the application of the proper standard of proof. The holding of the Court of Civil Appeals as to the proper construction to be placed upon the judgment and opinion of this Honorable Court, is stated briefly in the opinion of said Court of Civil Appeals, rendered on April 12, 1939, as follows: (See Exhibit A, *infra*, p. 59, *State v. Lone Star Gas Co.*, 129 S. W. (2d) 1164, 1169)

“Briefly, we construe the opinion of the Supreme Court as holding that in this statutory action to review and enforce the order of the Commission prescribing the 32-cent rate for gas supplied by the Gas Company to its allied distributing companies at the city gates of Texas cities and towns, which rate order was made upon consideration by the Commission of the Gas Company’s properties in both Texas and Oklahoma as an integrated system, the Gas Company was entitled to have the sufficiency of its evidence judged by the criterion used by the Commission; and that the trial court’s judgment based upon the jury’s finding upon the same criterion that the rate was confiscatory could not be set aside by this Court upon the ‘untenable’ and ‘alternative’ ground and ruling as to the necessity of the Gas Company’s making a proper segregation of its interstate and intrastate properties and operations. That the Supreme Court did not itself determine from the over-all evidence the legal question of whether the Gas Company had shown by ‘clear and satisfactory evidence’ that the rate order was not based upon substantial evidence, or that the rate prescribed would not afford the Gas Company a reasonable return on the fair value of its Texas and Okla-

homa properties used in the Texas public service; and that having held that this Court did not consider, weigh, nor give any effect whatever to the over-all evidence, then this Court is now entitled and required to do so, and to determine the case according as such review of the over-all evidence and law and justice may require."

VI.

Having concluded that the judgment and opinion of this Honorable Court did not preclude a consideration of the evidence from the view point of the over-all operations of the company, the Court of Civil Appeals proceeded to consider the sufficiency of said evidence, and on April 12, 1939, rendered its opinion holding that "the validity of the 32-cent city gate rate prescribed by the Commission is (1) conclusively established as a matter of law, and (2) factually from so overwhelming a weight and preponderance of the evidence as to require a reversal in the interest of justice." (See Exhibit A, *infra*, p. 116, *State v. Lone Star Gas Co.*, 129 S. W. (2d) 1164, 1187). The judgment of the trial court was accordingly reversed, the injunction restraining the enforcement of the rate order of the Railroad Commission was dissolved, and the rate order of the Railroad Commission was declared to be just, reasonable, non-confiscatory, and valid in every particular. A true copy of the opinion of the Court of Civil Appeals in this case (reported, *State v. Lone Star Gas Company*, 129 S. W. (2d) 1164) is attached hereto and marked Exhibit "A", *infra*, p. 53. On April 12, 1939, the Court of Civil

Appeals entered its judgment in conformity with said opinion. A true copy of said judgment is attached hereto and marked Exhibit "B," *infra*, p. 117.

VII.

On April 27, 1939, the appellee in said Court of Civil Appeals, Lone Star Gas Company, filed a motion for rehearing in said cause and on May 15, 1939, filed a supplemental motion for rehearing, contending, among other things, that the judgment of the Court of Civil Appeals and the said opinion of said court, entered on April 12, 1939, were contrary to the judgment and the mandate of this Honorable Court. A true copy of the motion for rehearing of the said appellee, Lone Star Gas Company, and of its supplemental motion, which was combined with its motion for rehearing, is attached hereto and is marked Exhibit "C" *infra*, p. 119.

VIII.

On June 7, 1939, the said Court of Civil Appeals overruled the motion for rehearing and the supplemental motion for rehearing, filed by the appellee, Lone Star Gas Company, the judgment of the court overruling said motions for rehearing being attached hereto and marked Exhibit "D," *infra*, p. 234. On June 14, 1939, the said Court of Civil Appeals also rendered an opinion, denominated a "concurring opinion," overruling among others, the contention that the judgment entered on April 12, 1939, was

contrary to the judgment and mandate of this Honorable Court, a true copy of the said "concurring opinion" being attached hereto and marked Exhibit "E," *infra*, p. 235.

IX.

On July 7, 1939, the appellee in said Court of Civil Appeals, Lone Star Gas Company, filed in said Court of Civil Appeals an application for writ of error, praying that said cause be removed to the Supreme Court of Texas. Among other things, the said Lone Star Gas Company contended in said application for writ of error that the judgment and opinion of the Court of Civil Appeals were contrary to the judgment and mandate of this Honorable Court. A true copy of said application for writ of error, is attached hereto and is marked Exhibit "F," *infra*, p. 254.

X.

Thereafter, on November 22, 1939, the Supreme Court of Texas granted the application for writ of error in said cause, a true copy of said order granting said application for writ of error of Lone Star Gas Company being attached hereto and marked Exhibit "G," *infra*, p. 492.

XI.

On April 30, 1941, the Supreme Court of Texas rendered its opinion and judgment, reversing the judgment of the Court of Civil Appeals insofar as

said Court of Civil Appeals rendered judgment for the State of Texas, affirming the judgment of the Court of Civil Appeals in so far as said Court of Civil Appeals reversed the judgment of the District Court, and remanding the case to the District Court for a new trial. A true copy of the opinion of the Supreme Court of Texas in said cause is attached hereto and marked Exhibit "H," *infra*, p. 493, and a true copy of its judgment is attached hereto and marked Exhibit "I," *infra*, p. 545.

XII.

The ground for the reversal by the Supreme Court of Texas of the judgment of the Court of Civil Appeals in so far as said judgment rendered judgment holding the rate order valid, was that the Court of Civil Appeals was precluded from considering the sufficiency of the evidence to sustain a finding by the jury in the trial court that the rate was confiscatory, because of the holding of this Honorable Court in its opinion and judgment reversing this case and remanding it to the Court of Civil Appeals for further proceedings. The Supreme Court of Texas held that this Honorable Court had passed upon the sufficiency of the evidence, had held it to be sufficient to sustain the verdict of the jury, and therefore that the Court of Civil Appeals had no authority to consider the evidence, under any standard, and that it had no authority to hold the evidence insufficient to sustain a finding that the rate was confiscatory. The holding of the Supreme Court of Texas is summarized in the following sentences from its opinion: (See Exhibit

H, *infra*, pp. 509, 515, *Lone Star Gas Co. v. State*, 153 S. W. (2d) 681, 688, 691)

"After an exhaustive study of Chief Justice Hughes' opinion in this case in the United States Supreme Court, and after viewing such opinion in the light of this record, we have reached the opinion that there is no escape from the conclusion that the United States Supreme Court did consider and did pass upon the sufficiency of the Gas Company's evidence, when considered from the viewpoint of the Company's entire property, and did hold such evidence legally sufficient to sustain the verdict of the jury finding this rate order confiscatory. . . .

"From what has been said it is evident that the United States Supreme Court did consider the question as to whether the evidence offered by the Gas Company in the district court was sufficient, in law, to raise a fact issue on the question of confiscation, and did hold such evidence sufficient. It follows that the question has been decided by the United States Supreme Court in favor of the Gas Company, and such decision is binding on this court, and was binding on the court of civil appeals."

XIII.

As a result of its holding that the sufficiency of the evidence to sustain the verdict of the jury was passed upon by this Honorable Court in favor of Lone Star Gas Company, the Supreme Court of Texas not only reversed the judgment of the Court of Civil Appeals, but also held that it (the Supreme

Court of Texas) would not itself consider the sufficiency of such evidence.

XIV.

Said opinion and judgment of the Supreme Court of Texas is erroneous and is a misconstruction and a misapplication of the opinion, judgment, and mandate of this Honorable Court, and is a failure by the Supreme Court of Texas to comply with and follow the mandate of this Honorable Court for the reason that this Honorable Court did not hold that the evidence adduced at the trial in the District Court was sufficient to sustain the verdict of the jury holding the said rate order to be confiscatory, but merely held that the validity of the rate order in the District Court should be judged by the same standard as that used by the Railroad Commission at its hearing preceding the promulgation of the order, that the Court of Civil Appeals had applied an untenable standard of proof in passing upon the sufficiency of the evidence, and that the cause should be remanded to the Court of Civil Appeals for further proceedings in order that the Court of Civil Appeals might properly exercise its function of passing upon the sufficiency of the evidence by the application of the proper standard of proof.

XV.

By a motion for rehearing filed on May 15, 1941, the defendants in error in the Supreme Court of

Texas, The State of Texas, et al., (petitioners here) assigned error in the judgment and opinion of the Supreme Court of Texas upon the ground that said judgment had misconstrued and has misapplied the opinion of this Honorable Court, and prayed that the Supreme Court of Texas should set aside its judgment in so far as it held that the Court of Civil Appeals was precluded by the judgment of this Honorable Court from a consideration of the sufficiency of the evidence to sustain the judgment of the District Court, by the application of the proper standard of proof as determined by the decision of this Honorable Court. A copy of the motion for rehearing of defendants in error in the Supreme Court of Texas is attached hereto and is marked Exhibit "J," *infra*, p. 547.

XVI.

On May 15, 1941, a motion for rehearing was also filed in the Supreme Court of Texas by the plaintiff in error, Lone Star Gas Company, a copy of said motion for rehearing being attached hereto and marked Exhibit "K," *infra*, p. 575.

XVII.

By its order entered July 16, 1941, the Supreme Court of Texas overruled the motion for rehearing filed by the defendants in error in said cause in the Supreme Court of Texas, and also on said July 16, 1941, the Supreme Court of Texas overruled the motion for rehearing filed by the plaintiff in error in

said cause. A true copy of the order of the Supreme Court overruling said motions for rehearing is attached hereto and is marked Exhibit "L," infra, p. 585.

XVIII.

No further relief can be obtained by these petitioners in the courts of the State of Texas, the Supreme Court of Texas being the highest court in said state in which decision can be had in this cause, and the said motion for rehearing, which was overruled by the Supreme Court of Texas as aforesaid, being the last procedure in the courts of Texas which is available to petitioners for correction of said judgment by said Supreme Court of Texas.

XIX.

Petitioners have no adequate remedy except by the prosecution of this petition for a writ of mandamus in the nature of procedendo, for the reason that the judgment of the Supreme Court of Texas is not a final judgment, in that it reverses and remands the case to the District Court for a new trial and does not finally dispose of all of the issues in said case and said judgment is, therefore, not a final judgment which can be brought to this court on appeal or certiorari under the provisions of Section 237 of the Judicial Code (28 U.S.C., sec. 344). The only relief which petitioners have to enforce the proper compliance with the judgment, opinion, and mandate of this court and prevent the evasion and misapplication thereof, is by a petition for this writ of mandamus in

the nature of procedendo, under the provisions of Section 262 of the Judicial Code (28 U.S.C., sec. 377).

XX.

Petitioners would further show the court that irreparable and inestimable damage will be done to petitioners by the judgment of the Supreme Court of Texas, in that said judgment remands the cause to the District Court for a new trial upon all issues, which will involve an extremely expensive and protracted hearing, whereas, if the Supreme Court of Texas correctly followed the mandate of this Honorable Court, and held that the Court of Civil Appeals had a right to consider the sufficiency of the evidence to sustain the verdict of the jury, this case could be finally disposed of by an affirmance of the judgment of the Court of Civil Appeals, and the retrial of this case and the necessary expense incident thereto could thereby be avoided.

XXI.

Wherefore, petitioners pray that a writ of mandamus in the nature of procedendo may issue out of this court, directed to the Honorable James P. Alexander, Chief Justice, and the Honorable Richard Critz and the Honorable John H. Sharp, Associate Justices, of the Supreme Court of Texas, requiring them to vacate the judgment heretofore entered by the Supreme Court of Texas on April 30, 1941, re-

versing the judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas, in so far as said Court of Civil Appeals rendered judgment upholding the rate order of the Railroad Commission of Texas, and that said writ further provide that the Supreme Court of Texas proceed to take such further action and render such further judgment as shall be proper under the laws of the State of Texas, conceding the power, jurisdiction, and authority of the said Court of Civil Appeals, under the judgment, mandate, and opinion of this Honorable Court, to consider and pass upon the sufficiency of the evidence to sustain the verdict of the jury in the District Court by applying the standard of proof approved by this Honorable Court, and that petitioners have such other and further relief in the premises as shall be just and proper.

GERALD C. MANN

Attorney General of Texas

JAMES P. HART

Austin, Texas

Attorneys for Petitioners, the
State of Texas, the Railroad
Commission of Texas, and Its
Members, and the Attorney
General of Texas

THE STATE OF TEXAS }
COUNTY OF TRAVIS } BEFORE ME, the un-
dersigned authority, on this day personally appeared

_____, who, being by me duly
sworn, says that he is one of the petitioners in the
foregoing cause, that he has read the foregoing peti-
tion, and that the statements therein contained are
true.

SUBSCRIBED AND SWORN to before me this _____ day
of _____, 1941.

**BRIEF IN SUPPORT OF PETITION FOR A WRIT
OF MANDAMUS IN THE NATURE OF
PROCEDENDO**

THE NATURE OF THE CASE

The principal question in this case is the proper construction of this Court's opinion, judgment and mandate in No. 313, October Term, 1937, *Lone Star Gas Co. v. Texas*, 304 U. S. 224. The Court of Civil Appeals, to which this Court's mandate was directed, construed this Court's judgment to permit the Court of Civil Appeals to re-examine the evidence, under the standard of proof required by this court. Upon such re-examination, the Court of Civil Ap-

peals again upheld the Railroad Commission's rate order. The Supreme Court of Texas reversed the judgment of the Court of Civil Appeals upon the sole ground that it was required to do so by the judgment of this Court, which it construed to preclude any consideration of the evidence by the Court of Civil Appeals.

Petitioners urge that the Supreme Court of Texas, in reversing the judgment of the Court of Civil Appeals on the ground that it was precluded from a consideration of the sufficiency of the evidence on the issue of confiscation by the judgment and mandate of this Court, misconstrued the judgment, and therefore failed to obey the mandate, of this Court. Since the Supreme Court of Texas remanded the cause to the District Court for a new trial, the judgment of the Supreme Court of Texas is not "final" within the provisions of Section 237 of the Judicial Code (28 U.S.C., s. 344) and therefore petitioners cannot bring the case here by appeal or certiorari. Petitioners therefore bring this petition for a writ of mandamus in the nature of procedendo, under the authority of Section 262 of the Judicial Code (28 U.S.C., Sec. 377) to compel the proper enforcement of the judgment heretofore entered by this Court.

THE FORM OF RELIEF PRAYED FOR

Petitioners have no remedy by appeal or certiorari because the judgment of the Supreme Court of Texas,

entered on April 30, 1941 (Exhibit I, *infra*, p. 545) is not a "final judgment" within the meaning of Section 237 of the Judicial Code (28 U.S.C., sec. 344), since it remands the case for a new trial in the District Court. Such a judgment has been frequently held not to be a "final judgment," under Section 237. *Louisiana Navigation Co. v. Oyster Commission of Louisiana*, 226 U. S. 99; *Laclede Gas Light Co. v. Public Service Commission of Missouri*, 304 U. S. 398.

It cannot be doubted, however, that this Court has power to enforce the full and correct compliance with its judgment by a state court. This question was settled by *Martin v. Hunter's Lessee*, 1 Wheaton, 304, which has been consistently followed by this Court in later cases. *Tyler v. Magwire*, 17 Wallace, 253; *Stanley v. Schwalby*, 162 U. S. 255.

It is true that in the cases just cited the state courts had entered "final" judgments, after receiving the mandate of this Court, and therefore the remedy of a second writ of error (rather than mandamus) was sought and granted. Where there has been a "final" judgment in the state court, since the remedy by writ of error (now appeal) is available and adequate, it has been held that a writ of mandamus will not be granted. *In re Blake*, 175 U. S. 114. It is submitted that this holding is based upon the settled rule that mandamus will not be issued where there is another, adequate remedy, (*Ex parte Baltimore & Ohio Railroad Co.*, 108 U. S. 566; *In re Morrison*, 147 U. S. 14) and that it is not authority

for the position that this Court will not issue any necessary extraordinary writ to a state court where the judgment of this Court has not been correctly construed and obeyed.¹ While this Court is desirous of avoiding conflicts with courts of a state, such conflict cannot be escaped where a state court has erroneously construed and failed to carry out the judgment of this Court. In order to protect its appellate jurisdiction, this Court has plenary power to issue such writs as may be necessary to compel the proper enforcement of its judgments, under the very terms of Section 262 of the Judicial Code (28 U.S.C.A., sec. 377):

“Power to issue writs. The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law. (R. S. § 716; Mar. 3, 1911, c. 231, § 262, 36 Stat. 1162.)”

This Court is not helpless to grant relief where the state court has entered some order, contrary to the mandate of this Court, but which does not amount to a “final” judgment. In *Williams v. Bruffy*, 102 U. S. 248, the Supreme Court of Appeals of Virginia declined to take any action toward the enforcement

¹In this respect, it is submitted that the statement in Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States*, Section 12, that “the summary character of the proceeding by mandamus renders it inappropriate in dealing with state tribunals”, is too broad.

of the mandate of this Court. The plaintiff in error thereupon applied to this Court, "that this Court will take such proceedings as will render its judgment effectual." (See *Williams v. Bruffy*, 102 U. S. 148). This Court upon such petition entered the judgment which, under its mandate, would have been the proper judgment for the Supreme Court of Appeals of Virginia to have entered. From this case, it is plain that this Court's hands are not tied by the failure of the state court to enter a "final" judgment, but that such steps as are necessary may be taken, to insure the correct enforcement of this Court's judgment.

That a writ of mandamus might be issued to a state court in a proper case was intimated in *Martin v. Hunter's Lessee*, 1 Wheaton, 304, 362, where Mr. Justice Story said:

"We have not thought it incumbent on us to give any opinion upon the question, whether this court have authority to issue a writ of *mandamus* to the Court of Appeals to enforce the former judgments, as we do not think it necessarily involved in the decision of this cause."

Compare *Graham v. Norton*, 15 Wallace, 427, 428, where Chief Justice Chase said:

"In the thirteenth section of the Judiciary Act' this court is clothed with power to issue 'writs of mandamus in cases warranted by the processes and usages of law to any courts appointed or persons holding office under the au-

¹Now Section 234, Judicial Code (28 U.S.C., s. 342.)

thority of the United States'. This express authority to issue writs of mandamus to National courts and officers has always been held to exclude authority to issue these writs to State courts and officers. The only exception is that just adverted to, *where they have been issued as process to enforce judgments.*

"The fourteenth section' clothes all the courts of the United States with power to issue certain specific writs, and *all other writs which may be necessary for the exercise of their respective jurisdictions. . . .*" (Emphasis added)

The writ of mandamus is the remedy which this Court has frequently granted to enforce its judgments where they have been misconstrued or disobeyed by lower Federal Courts, and where the remedy by appeal is not available. *In re Potts*, 166 U. S. 263; *Gaines v. Rugg*, 148 U. S. 228; *In re Washington & Georgetown Railroad Co.*, 140 U. S. 91; *Ex parte Dubuque & Pacific Railroad Co.*, 1 Wallace, 69. Compare *In re Sanford Fork & Tool Co.*, 160 U. S. 247.

¹Now section 262, Judicial Code (28 U.S.C., s. 377).

²See *In re Dowd*, 133 Fed. 747, 751 (Cir. Ct., Colo., 1904):

"Not only this, but by virtue of its appellate jurisdiction the Supreme Court of the United States has the power to issue its writ of mandamus to the Supreme Court of the state of Colorado either in aid or in the exercise of its appellate jurisdiction, and in this way to exercise a certain supervisory power over the action of that court. *Livingston v. Dargenols*, 7 Cranch, 577, 588, 3 L. Ed. 444; *Ex parte Bradstreet*, 7 Pet. 634, 644, 8 L. Ed. 810; *New York Life & Fire Ins. Co. v. Wilson*, 8 Pet. 291, 303, 8 L. Ed. 949; *Ex parte Roberts*, 15 Wall. 384, 386, 21 L. Ed. 131; *Insurance Co. v. Comstock*, 16 Wall. 258, 270, 21 L. Ed. 493; *Virginia v. Rives*, 100 U. S. 313, 316, 323, 327, 329, 25 L. Ed. 667. . . ."

In the present case, petitioners do not ask that the proper discretion of the Supreme Court of Texas be restricted, or that it be directed to enter any particular judgment. Petitioners merely ask that the Supreme Court of Texas be required to vacate so much of its judgment as reversed the judgment of the Court of Civil Appeals on the ground that that Court was precluded from considering the sufficiency of the evidence on the issue of confiscation by the judgment of this Court. If the relief here prayed for is granted, the Supreme Court of Texas will be left free to decide, under Texas law, whether the judgment of the Court of Civil Appeals that the evidence was insufficient as a matter of law to show confiscation should be affirmed or reversed, granting that the Court of Civil Appeals had the authority under this Court's judgment to pass on the sufficiency of the evidence by the application of the proper standard.

Where, as in this case, petitioners do not pray that the lower court be required to enter a particular judgment, but merely that it set aside its former judgment and proceed to enter such judgment as shall be proper, the writ of mandamus in the nature of procedendo is the proper remedy. It has customarily been issued in such cases by this Court to lower Federal Courts. *Livingston v. Dorgenois*, 7 Cranch, 577; *Ex parte Bradstreet*, 7 Peters, 634; *Life & Fire Insurance Co. v. Wilson*, 8 Peters, 291; *Ex parte Rob-*

erts, 15 Wallace, 384. Compare *Knickerbocker Insurance Co. v. Comstock*, 16 Wallace, 258.'

That the petitioners will be damaged by the error of the Supreme Court of Texas in its construction of the judgment of this Court, is apparent. The Court of Civil Appeals, believing that it had the authority to examine the sufficiency of the evidence by applying the proper standard, made a careful and detailed analysis of the evidence, and concluded that the evidence was insufficient to show that the order was confiscatory or unjust or unreasonable, and held the order to be valid. The Supreme Court of Texas did not undertake to pass on the sufficiency of the evidence or the correctness of the Court of Civil Appeals' decision on its merits, but merely held that the Court of Civil Appeals had no right to consider the sufficiency of the evidence, because it was precluded from doing so by the judgment of this Court. If the Supreme Court of Texas had correctly construed the judgment of this Court, as we believe the Court of Civil Appeals did, then it would have had to de-

*Compare *In re Press Printers & Publishers, Inc.*, 12 F. (2d) 630, 664 (3rd Cir., 1926):

" . . . If the petition had been properly drawn, it would have been illustrative of the earliest form of the writ of mandamus. The writ of procedendo ad iudicium was the earliest remedy for the refusal or neglect of justice on the part of the courts. It was an original writ, issuing out of chancery to the judges of any subordinate court, commanding them in the king's name to proceed to judgment, but without specifying any particular judgment. . . . "

See also *Exchange Mutual Life Insurance Co. v. Warsaw-Wilkinson Co.*, 185 Fed. 487, 488 (3rd Cir., 1910):

" . . . A procedendo is a writ from a higher to a lower court, directing that the case be proceeded with. It does not undertake to say what the decision shall be, but merely that there shall be one. 3 Black. Com. 109; *Yates v. People*, 6 Johns. (N.Y.) 462; 2 Crompt. Prac. 433; 1 Fitzh. N.B. 153, 154, 240. . . . "

cide on the merits whether or not the Court of Civil Appeals' judgment is correct. Instead, the Supreme Court held that the question of the sufficiency of the evidence was as a matter of law, foreclosed by this Court's judgment, and, for that reason, that the judgment of the Court of Civil Appeals upholding the validity of the Railroad Commission's order should be reversed.

We cannot say for certain what the judgment of the Supreme Court of Texas will be if this Court grants the relief here prayed for. The Supreme Court of Texas *will* then be required to hold that the Court of Civil Appeals was not precluded, by this Court's judgment, from passing on the sufficiency of the evidence to sustain the jury's verdict, and the Supreme Court will have to decide on the merits and assuming that the Court of Civil Appeals had the right to pass on the sufficiency of the evidence, whether the Court of Civil Appeals' judgment should be affirmed or reversed. We believe it should be affirmed. In any event, the Supreme Court of Texas will have to decide the case on the proper basis and not on an erroneous construction of this Court's judgment.

This rate order has already been in litigation for about seven years. Under the decision of the Supreme Court of Texas based upon an erroneous construction of this Court's judgment, it must again pursue the tedious process of a lengthy trial and the ensuing appeals. At every point, the construction

of the opinion and judgment of this Court will be raised. Much expense, confusion and delay can be saved all parties if this Court will now grant the writ here prayed for, compelling the enforcement of its judgment as it is to be correctly construed. If, as we believe, this Court did not intend to pass upon the sufficiency of the evidence on the issue of confiscation, but merely to require the consideration of the evidence by the proper standard, then justice requires that the error of the Supreme Court of Texas be corrected now, in order that a retrial of the case upon an entirely erroneous conception of this Court's judgment may be avoided.

THE PROPER CONSTRUCTION TO BE PLACED UPON THE JUDGMENT OF THIS COURT

1. Holding of the Supreme Court of Texas

The Supreme Court of Texas has held that in the former judgment of this Court in No. 313, October Term, 1937, *Lone Star Gas Company v. State of Texas*, 304 U. S. 224, this Court considered the sufficiency of the evidence of Lone Star Gas Company on the issue of confiscation and held such evidence to be sufficient to sustain the verdict of the jury in the District Court. Having so construed the judgment of this Court, the Supreme Court of Texas held that the Court of Civil Appeals was precluded from passing upon the sufficiency of the evidence. The holding of the Supreme Court of Texas is summarized

in its opinion as follows: (See Exhibit H, *infra*, pp. 509, 515, *Lone Star Gas Company v. State*, 153 S. W. (2d) 681, 688, 691)

“After an exhaustive study of Chief Justice Hughes’ opinion in this case in the United States Supreme Court, and after viewing such opinion in the light of this record, we have reached the decision that there is no escape from the conclusion that *the United States Supreme Court did consider and did pass upon the sufficiency of the Gas Company’s evidence, when considered from the viewpoint of the Company’s entire properties, and did hold such evidence legally sufficient to sustain the verdict of the jury finding this rate order confiscatory.* In fact, we think this is the very essence of the United States Supreme Court’s holding.

“ * * *

“From what has been said it is evident that the United States Supreme Court did consider the question as to whether the evidence offered by the Gas Company in the district court was sufficient, in law, to raise a fact issue on the question of confiscation, and did hold such evidence sufficient. It follows that that question has been decided by the United States Supreme Court in favor of the Gas Company, and such decision is binding on this Court, and was binding on the Court of Civil Appeals.” (Emphasis added)

2. The Holding of the Court of Civil Appeals

Before reaching the conclusion that was reversed by the Supreme Court of Texas, the Court of Civil

Appeals, upon the receipt of the mandate of this Court, had given careful consideration to the interpretation of the judgment of this Court. In its opinion (See Exhibit A, *infra*, p. 54, *State v. Lone Star Gas Co.*, 129 S. W. (2d) 1164, 1168) the Court of Civil Appeals states the contentions of the parties as to the proper construction to be placed upon the judgment of this Court as follows:

“The Commission contends that since the Supreme Court reversed this Court’s judgment solely upon its ‘untenable’ ruling as to the necessity of the Gas Company’s making a proper segregation of its interstate and intrastate property and business, and remanded the cause ‘for further proceedings not inconsistent with the opinion of the Supreme Court,’ this Court is required to review the ‘over-all’ or unsegregated basis and evidence, which means the evidence relating to the Gas Company’s entire integrated operating system in both Texas and Oklahoma as considered by the Commission in prescribing the rate order, and render whatever judgment is proper; and either to reverse the judgment of the District Court and render judgment sustaining the rate order as this Court did before; or to reverse the judgment of the District Court on account of the several errors of practice complained of and remand the cause for another trial on the merits, according as such over-all evidence and law and justice may require; and that either course would be entirely consistent with the opinion of the Supreme Court.

“The Gas Company contends that in the ‘further proceedings’ carrying out the mandate of

the Supreme Court, this Court can not review, weigh, nor consider the so-called over-all evidence and make findings thereon, and then render any judgment such findings may require, and especially the same judgment that has already been reviewed and reversed by the Supreme Court; that the Supreme Court 'reversed the judgment of this Court, not because this Court failed to make findings on the over-all evidence, but because this Court set aside the findings made by the "trier of facts" in the District Court by applying to the over-all evidence sustaining such findings, an improper test or standard to determine its sufficiency;' and that the only judgment this Court may now render is to affirm the judgment of the District Court.

"The contention now made by the Gas Company that this Court held the over-all evidence insufficient to sustain the judgment of this District Court is directly opposed to the position taken by it before the Supreme Court. There the Gas Company contended that this Court had not given any consideration, weight, nor effect whatever to the over-all evidence, but had totally disregarded same, and had based its judgment solely upon its ruling as to the necessity of the Gas Company's making a proper segregation of its interstate and intrastate property and business. So well did the Gas Company argue its point that the Supreme Court adopted that view and expressly reversed the judgment of this Court upon that sole ground."

After discussing the opinion of this Court, the Court of Civil Appeals stated its conclusions as to the proper interpretation of the opinion as follows: (See

Exhibit A, p. 59, *infra*, *State v. Lone Star Gas Co.*, 129 S. W. (2d) 1164, 1169)

“Briefly, we construe the opinion of the Supreme Court as holding that in this statutory action to review and enforce the order of the Commission prescribing the 32-cent rate for gas supplied by the Gas Company to its allied distributing companies at the city gates of Texas cities and towns, which rate order was made upon consideration by the Commission of the Gas Company’s properties in both Texas and Oklahoma as an integrated system, the Gas Company was entitled to have the sufficiency of its evidence judged by the criterion used by the Commission; and that the trial court’s judgment based upon the jury’s finding upon the same criterion that the rate was confiscatory could not be set aside by this Court upon the ‘untenable’ and ‘alternative’ ground and ruling as to the necessity of the Gas Company’s making a proper segregation of its interstate and intrastate properties and operations. That the Supreme Court did not itself determine from the over-all evidence the legal question of whether the Gas Company had shown by ‘clear and satisfactory evidence’ that the rate order was not based upon substantial evidence; or that the rate prescribed would not afford the Gas Company a reasonable return on the fair value of its Texas and Oklahoma properties used in the Texas public service; and that having held that this Court did not consider, weigh, nor give any effect whatever to the over-all evidence, then this Court is now entitled and required to do so, and to determine the case according as such review of the over-all evidence and law and justice may require. Any other conclusion would deprive this Court of its

final jurisdiction to determine all questions of fact raised on the appeal as it is required to do under the Texas Constitution, Vernon's Ann. St. (Art. 5, 6), which defines the jurisdiction of the Courts of Civil Appeals, and provides, 'that the decision of said courts shall be conclusive on all questions of fact brought before them on appeal or error.' "

Having so concluded, the Court of Civil Appeals proceeded to make a full analysis of the evidence by the standard of proof required by this Court, and, having concluded that the evidence was insufficient as a matter of law, entered its judgment reversing the judgment of the District Court and holding the rate order of the Railroad Commission to be valid. (See Exhibit A, *infra*, p. 116, *State v. Lone Star Gas Co.*, 129 S. W. (2d) 1164, 1187)

3. Analysis of the Judgment and Opinion of this Court.

The question here presented, therefore, is whether the Court of Civil Appeals or the Supreme Court of Texas adopted the correct construction of the opinion and judgment of this Court. In other words, did this Court go into and decide the sufficiency of the Gas Company's evidence on the issue of confiscation (as was held by the Supreme Court of Texas), or did it merely hold that the Court of Civil Appeals had erroneously applied the wrong standard of proof and therefore that the case should be remanded to the Court of Civil Appeals for consideration of the evi-

dence by the proper standard (as was held by the Court of Civil Appeals)?

Petitioners earnestly submit that the Court of Civil Appeals adopted the correct construction of this Court's opinion, and that the Supreme Court of Texas' construction is erroneous. We believe that our position is sustained by the express language of this Court's opinion, and by the established practice of this Court in remanding cases for further consideration where questions of the sufficiency of evidence (especially where they involve questions of state law) have not been passed upon properly by lower courts.

The language of this Court's opinion must, of course, be construed as a whole. However, it is submitted that a careful reading of the entire opinion will show that the actual holding of the Court on the issue of confiscation (the issue of interstate commerce concededly having been eliminated) is stated in the following sentences from this Court's opinion: (See *Lone Star Gas Co. v. Texas*, 304 U. S. 224, 240-241):

"The Court of Civil Appeals reversed the judgment upon a distinct ground. That was that appellant had not sustained its burden of proof because it had failed to make 'a proper segregation of interstate and intrastate properties and business.' Thus, the necessity for that segregation was made the criterion. That is clearly shown both from the court's main opinion and its opinion upon rehearing from which we have

quoted. 'Having failed to make a proper segregation of interstate and intrastate properties,' said the court, 'appellee (appellant here) did not adduce the quantum and character of proof necessary to establish the invalidity of the rate as being confiscatory, or unreasonable and unjust.'

"We think that this ruling as to the necessity of segregation, and that the sufficiency of appellant's evidence should be determined by that criterion, was erroneous. * * *"

The foregoing quotation from this Court's opinion stated the ruling of the Court of Civil Appeals which was being reversed. The Court of Civil Appeals, it was held, applied an untenable standard of proof; in doing so it erroneously ignored evidence offered by the Gas Company relating to its property and business as an integrated operating system; and the judgment of the Court of Civil Appeals was therefore reversed and the cause remanded "for further proceedings not inconsistent" with the opinion of this Court.

The analysis of this Court's opinion by the Supreme Court of Texas is, we submit, plainly erroneous. First, the Supreme Court of Texas argues that this Court must have held that the evidence was legally sufficient to sustain the verdict of the jury in the District Court, because otherwise the reversal of the judgment of the Court of Civil Appeals would have been for "harmless error." The exact words of the Supreme Court of Texas on this point are as

follows: (See Exhibit H, *infra*, p. 509, *Lone Star Gas Co. v. State*, 153 S. W. (2d) 681, 689)

“Furthermore, if the evidence contained in this record does not even raise a fact issue to be submitted to the jury, the United States Supreme Court reversed this judgment on an absolutely harmless error, and that after that fact had been fully called to its attention by the exhaustive brief and argument filed by the State. We should not ascribe such an action to the United States Supreme Court unless we are compelled to do so.”

This argument by the Supreme Court of Texas assumes that this Court, upon finding that a lower court has failed to consider evidence upon the proper basis, will proceed to consider the evidence to determine whether or not it is sufficient when judged by the proper standards. This assumption is contrary to the practice of this Court in such cases. The nature of the business of this Court is such that it cannot undertake ordinarily in the first instance to make an examination of the evidence, where the lower court has failed to do so. This is particularly true where, as in this case, the evidence is voluminous and technical and dependent for its proper interpretation to some extent upon an understanding of local conditions, and, where, as here, the determination of the sufficiency of the evidence may turn on questions of state law. By reversing and remanding such a case for a determination of the evidence on a proper basis, this Court does not do a useless thing, nor does it reverse the judgment “on an absolutely harmless

error." It is important that the lower courts primarily charged with the duty of passing on the evidence be required to perform their functions properly, and that this Court in such cases should be only a Court of review. The fact that the Court of Civil Appeals, upon a consideration of the evidence upon the proper basis, reached the same conclusion as in its former judgment, does not indicate that its judgment was reversed for "harmless error." A consideration of the evidence by applying an improper standard of proof is error and is harmful, even though the same result might be reached if the proper standard be applied. Whether the same conclusion should be reached by applying the proper standard of proof should primarily be determined by the Court which has the primary duty to do so. For this reason, this case was remanded to the Court of Civil Appeals for a consideration of the evidence by the application of the proper standard of proof.⁶

The practice of remanding cases to the state courts for further consideration of the evidence has been followed by this court in a number of cases, where the state courts because of erroneous conclusions of

⁶See Frankfurter and Landis, "The Supreme Court under the Judiciary Act of 1925," (1928) 42 Harvard Law Review, 1, 22, 23:

" * * * Lower courts ought to be required to report findings of those facts which determine Supreme Court decisions. Such findings are demanded by the whole range of public law litigation—the review of rate regulation, the respective fields of control over interstate commerce, the various instances of state legislation challenged under the Fourteenth Amendment. It is not for the Supreme Court to disentangle confused testimony, nor for a Court charged with keeping our constitutional system in equilibrium to pass upon disputation over evidence. The credibility of witnesses, the reconciliation of conflicting testimony, the proof of economic data, and the reliability of experts are problems with which, as a rule, the Supreme Court ought not to be inflicted.

law, have failed to consider the evidence upon a proper basis.

A good example of the application of this rule is to be found in the case of *Northern Pacific Railway Company v. Concanon*, 239 U. S. 382. In that case the question involved was the right of the plaintiff to acquire title to land from the railway company by limitations. This depended upon the construction of a Federal statute, which the Supreme Court of the State of Washington construed to permit the acquisition of title by adverse possession completed after the date of the act. Having adopted this construction of the Federal statute, the Supreme Court of the State of Washington did not pass upon the question as to whether adverse possession had been completed prior to the date of the act. Upon appeal to the Supreme Court of the United States, this court held that the Federal statute should be construed to validate titles only where the adverse possession had been completed prior to the date of the act. Since the state court had not passed upon the evidence upon that basis, this court, rather than examining the evidence itself, remanded the cause to the state court,

Carefully framed findings by the lower courts should serve as the foundation for review, leaving for the Supreme Court the ascertainment of principles governing authenticated facts, the accommodation between conflicting principles, and the adaptation of old principles to new situations. * * *

"The Supreme Court is equally dependent upon the thoroughness with which issues are sifted and explored before they reach the Court. In this process, the opinions below play an important role. They compel analysis and formulation of the issues in a controversy, sharpen responsibility in adjudication, and advise litigants and the appellate court of the factors that control decision. Only by such a process is the controversy adequately focussed for the consideration of the Supreme Court. * * *

in order that the state court might first pass upon the evidence upon the correct basis. Upon this point, Chief Justice White said: (239 U. S. at p. 387)

“Although from these considerations it results that our duty is to reverse because of the erroneous construction given to the act of Congress and which was the sole basis of the decision below, we are of the opinion that the order of reversal should not preclude the right in the court below to consider and pass upon, in the light of the statute as correctly construed, the question of adverse possession asserted to have been completed prior to the passage of the act which as we have seen the court did not dispose of because of the erroneous opinion which it entertained concerning the meaning of the act of Congress and our decree therefore will leave that question open. The issue thus left open involves a question arising under the state law which should be passed upon primarily by the state court. In saying this however we must not be considered as holding that ultimate authority to review such question when passed upon would not exist in this court to the extent that such power to review may be essential to the enforcement of the provisions of the act of Congress in question. *Kansas City Southern Ry. v. Albers Commission Co.*, 223, U. S. 573, 591; *Creswill v. Knights of Pythias*, 225 U. S. 246, 251; *Norfolk & Western Ry. v. West Virginia*, 236 U. S. 605, 609-610. See *Gaar, Scott & Co. v. Shannon*, 223 U. S. 468, 470-471. It follows subject to the reservation stated that the judgment below must be reversed and the case remanded for further proceedings not inconsistent with this opinion.”

The above case is direct authority for the order

entered by this court in this case. This court in this case held that the Court of Civil Appeals had erroneously required a segregation of the Texas properties of the company from the rest of its properties, and because of such erroneous ruling had disregarded the evidence properly offered by the Company relating to its integrated properties. The consideration of such evidence involves, of course, the *state questions* of whether the rate order was unjust and unreasonable under the state statute or in violation of the state constitution, as well as the question whether the order was in violation of the 14th Amendment to the Federal Constitution. This court, following its usual practice of permitting matters dependent upon the evidence to be primarily passed upon by the state courts, reversed the case so that the Court of Civil Appeals could primarily pass upon the evidence theretofore ignored by the Court of Civil Appeals because of its erroneous ruling.

Another illustration of the practice of this court of requiring that all matters pertaining to the weight to be given to the evidence should first be determined by the State courts, is the case of *Sioux City Bridge Company v. Dakota County, Nebraska*, 230 U.S. 441. In that case, the company was complaining of alleged arbitrary and discriminatory assessment of its property for tax purposes. It was contended by the company that its property was assessed at substantially 100% of its value, whereas other property was assessed at about 55% of its value. The state court ruled that the Company's rights under the 14th Amendment were not infringed if its property was

assessed at its fair value, and held that it was immaterial whether or not other property was undervalued. Having so held, the state court refused to pass upon the evidence tending to show discrimination. This court granted certiorari to the judgment of the Supreme Court of Nebraska, and held that systematic under-valuation of other property, while the plaintiff's property was valued at its true value, would be a violation of the 14th Amendment. This Court did not proceed to determine whether in fact the company's evidence was sufficient to show a discrimination, but remanded the case to the Supreme Court of Nebraska in order that that court might primarily consider the evidence under the correct criterion. In this connection, Chief Justice Taft said: (260 U. S. at p. 447)

“But we construe the action of the court not to be equivalent to a finding that such intentional discrimination existed between the valuation of the Bridge Company's property and that of all other real property and improvements in the county, but rather a ruling that even if it did exist, the Bridge Company must continue to pay taxes on a full 100 per cent valuation of its property. It was on the same principle, doubtless, that the District Court ignored the issue of discrimination altogether. It is therefore just that upon reversal we should remand the case for a further hearing upon the issue of discrimination, inviting attention to the well-established rule in the decisions of this Court, cited above, that mere errors of judgment do not support a claim of discrimination, but that there must be something more—something which in effect

amounts to an intentional violation of the essential principle of practical uniformity. *Sunday Lake Iron Co. v. Wakefield*, 247 U. S. 350, 353.

"The judgment of the Supreme Court of Nebraska is reversed and the case is remanded for further proceedings not inconsistent with this opinion." (Italics by the Court).

Compare *Chicago & Northwestern Railway Co. v. Durham Co.*, 271 U. S. 251, and *Ward v. Board of County Commissioners*, 253 U. S. 17. In each of these cases, the opinion of this Court expressly left open for decision questions involving state law which had not been determined by the State Court because of its erroneous conclusions upon questions of Federal law.

Where lower Federal courts have failed to pass upon evidence as they should have done, this court ordinarily remands the case to the lower court for further consideration. Examples of this practice are *Marconi Wireless Telegraph Co. v. Simon*, 246 U. S. 46; *Southern Pacific Co. v. Bogert*, 250 U. S. 483; *Vitelâ & Son v. United States*, 250 U. S. 355; *Lutcher & Moore Lumber Co. v. Knight*, 217 U. S. 257; *Gerdes v. Lustgarten*, 266 U. S. 321. Where the record is extremely long and technical as in rate cases like this case, it is especially important that the lower court pass upon the evidence before this Court is called upon to do so. An example of the holding of this Court in such a case is *Railroad Commission of California v. Pacific Gas & Electric Co.*,

302 U. S. 388, in which the concluding paragraph of this Court's opinion is as follows: (302 U. S. at p. 401)

"The main issue in this litigation is whether the rates as fixed by the Commission's order are confiscatory. The District Court did not determine that issue. The District Court should determine it. The decree is reversed and the cause is remanded for further proceedings in conformity with this opinion."

If this Court had intended to pass upon the sufficiency of the evidence to sustain a jury finding that the rate order was confiscatory, it certainly would have gone into a careful analysis of the evidence as, for example, was done by this Court in *Dayton Power & Light Co. v. Public Utilities Commission*, 292 U. S. 290. In the present case, on the contrary, this Court carefully refrained from going into the sufficiency of the Gas Company's evidence as to its integrated operations.

The Supreme Court of Texas apparently attaches great importance to this Court's comments that the Gas Company offered "much testimony and elaborate statistical data" and "voluminous testimony" as to its integrated operations and that this evidence was "appropriately addressed to the Commission's findings." (See Exhibit H, *infra*, pp. 513, 514, *Lone Star Gas Co. v. State*, 153 S. W. (2d) 681, 690). These statements by this Court, however, are only of a general nature and certainly do not constitute the careful analysis of the evidence which would have been

undertaken by this Court had it intended to pass upon the sufficiency of the evidence. It is submitted that all this Court said, in effect, was that the Gas Company offered evidence relating to its integrated operations, that this evidence was material and relevant and therefore should have been considered by the Court of Civil Appeals. The weight to be given to this evidence and its effect when considered in the light of the entire record were matters which were left to the Court of Civil Appeals to determine by the application of the proper standard of proof.

The Supreme Court of Texas further argues that this Court held in its opinion that the issue of confiscation was an issue for the jury to determine and therefore that the Court of Civil Appeals had no authority to set aside the jury's verdict on this issue (even if the proper standard of proof were applied.) This argument by the Supreme Court of Texas is based upon its interpretation of certain language of the opinion of this Court, as follows:

"In view of the definition of 'fair return' and 'unreasonable and unjust' in the Court's instructions, we are of the opinion that the issue for the jury to determine was in substance whether the rate was confiscatory." (304 U. S. at p. 231)

"The trial court submitted that evidence to the jury, upon a proper instruction as to the burden of proof resting upon appellant, and the jury found in appellant's favor." (304 U. S. at p. 240)

"The first and primary ground remained and the determination of the Court of first instance as the trier of facts that the Commission's rate was confiscatory could not properly be set aside by the application of an untenable standard of proof and in disregard of the evidence which had been appropriately addressed to the Commission's findings and *had been properly submitted to the jury.*" (304 U. S. at p. 242)

In interpreting the foregoing passages from this Court's opinion, the Supreme Court of Texas says in effect that this Court held that the issue of confiscation was one which the trial court had to submit to the jury, and therefore that the Court of Civil Appeals had no authority to set aside the jury's finding, even by applying the proper standard of proof. (See Exhibit H, *infra*, pp. 515, 530 *Lone Star Gas Company v. State*, 153 S. W. (2d) 681, 691, 695)

It is submitted that this interpretation of this Court's opinion is plainly in error. It is evident, in the light of this Court's entire opinion, that all that this Court intended to pass on was the propriety of the form of the issue in which the issue of confiscation was submitted to the jury, and the propriety of receiving in evidence before the jury the Company's testimony as to its integrated operations. This Court did not say that the issue had to be submitted to the jury or that the evidence, considered as a whole, was sufficient to sustain the jury's finding. Whether the issue was one to be submitted to a jury or to be decided by the court is plainly a question of state law, upon which this Court will not

undertake to pass. This was made abundantly clear by this Court in its opinion in *United Gas Public Service Company v. Texas*, 303 U. S. 123.

The questions of whether the issue of confiscation should be submitted to the jury and whether the finding of the jury could be reversed and rendered by the Court of Civil Appeals being questions of state practice, the only concern of this Court was whether the Gas Company had been given a fair opportunity to present its evidence on the issue of confiscation and to have such evidence considered by the application of the proper standard of proof. It was no concern of this Court whether the matter of confiscation be decided by the Court or the jury, or whether the Court of Civil Appeals does or does not have power to reverse and render the District Court's judgment, so long as the issue of confiscation is fairly considered under the standards established by this Court's judgment. The Supreme Court of Texas was therefore clearly in error in holding that this Court's judgment precluded the Court of Civil Appeals from considering, by the proper standard, the sufficiency of the evidence to sustain the jury's verdict.

It may be argued that the Supreme Court of Texas merely construed this Court's opinion to hold that the evidence on the issue of confiscation was conflicting, and that the judgment of the Supreme Court of Texas that the cause should be reversed depended upon questions of State law. The opinion of the Su-

preme Court of Texas goes much further, however, and holds that this Court adjudicated the question of the *sufficiency of the evidence*. The words of the Supreme Court of Texas are as follows: (See Exhibit H, *infra*, pp. 509, 530, *Lone Star Gas Co. v. State*, 153 S. W. (2d) 688, 691, 695)

“After an exhaustive study of Chief Justice Hughes’ opinion in this case in the United States Supreme Court, and after viewing such opinion in the light of this record, we have reached the decision that there is no escape from the conclusion that *the United States Supreme Court did consider and did pass upon the sufficiency of the Gas Company’s evidence, when considered from the viewpoint of the Company’s entire properties, and did hold such evidence legally sufficient to sustain the verdict of the jury finding this rate order confiscatory*. In fact, we think this is the very essence of the United States Supreme Court’s holding. * * *

“From our discussion of the United States Supreme Court opinion in this case it is evident that we hold that that court did consider and pass upon the sufficiency, in law, of the evidence contained in this record to raise an issue of fact on the question of confiscation involved in this appeal. It is also evident that we hold that such opinion decides that the evidence contained in this record is sufficient, in law, to invoke the fact finding jurisdiction of the district court. It follows that such matter has been foreclosed by the United States Supreme Court, and is not open for decision by this Court, and was not open for decision by the Court of Civil Appeals.” (Emphasis added)

In other words, the Supreme Court of Texas holds that this Court's opinion precludes the Texas courts from examining the evidence for the purpose of ascertaining its sufficiency, even by the application of the proper standard, and that, so far as the sufficiency of the evidence is concerned, there was no course open to the Court of Civil Appeals except to affirm the District Court's judgment. This is further evident from the Texas Supreme Court's opinion when the Court proceeds to discuss whether the judgment of the District Court should be affirmed or reversed because of errors in the admission of testimony. At this point the Supreme Court of Texas says: (See Exhibit H, *infra*, p. 533, *Lone Star Gas Co. v. State*, 153 S. W. (2d) 681, 697)

"From all that we have said it is evident that that part of the judgment of the Court of Civil Appeals which renders judgment for the State and the Railroad Commission upholding this gas rate order cannot stand. We shall now examine this record to determine whether we will affirm the judgment of the district court or reverse the same, and remand the cause for a new trial."

After a discussion of assigned procedural errors, the Supreme Court of Texas holds that there was error in the admission of certain testimony of the witness, Ed C. Connor, this being the only respect in which the Supreme Court of Texas agreed with the Court of Civil Appeals. (See Exhibit H, *infra*, p. 539, *Lone Star Gas Co. v. State*, 153 S. W. (2d) 681, 698)

If the Supreme Court of Texas had merely construed this Court's opinion to hold that the evidence was conflicting, then under the Texas practice the Court of Civil Appeals would have had authority to reverse the judgment and remand the case to the District Court for a new trial on the insufficiency of the evidence, and it would not have been necessary for the Supreme Court of Texas to go into the matter of procedural errors in order to decide whether to affirm the District Court's judgment or to reverse and remand the case. See *Post v. State*, 106 Tex. 500, 501, where it is said:

“The province of determining questions of fact is in the trial court. The Court of Civil Appeals has the power to set aside its finding and remand the cause for a new trial. * * * ”

See also *Dargan v. Keystone Mills Co.*, 126 Tex. 80, 82, where the rule is stated by the same judge who wrote the opinion in the Supreme Court of Texas in this case, as follows:

“It is the settled law of this State that this Court has no jurisdiction by writ or error to try issues of fact. It only has jurisdiction to decide law questions. It is also the settled law of this State that the Court of Civil Appeals is a court of last resort as to the sufficiency of evidence to support a fact finding of a trial court. * * * ”

In holding, therefore, that the District Court's judgment is to be reversed only because of error in the admission of testimony, and not because of the

Court of Civil Appeals' finding that the validity of the rate order was established "factually from so overwhelming a weight and preponderance of the evidence as to require a reversal in the interest of justice," (See Exhibit A, *infra*, p. 116, *State v. Lone Star Gas Co.*, 129 S. W. (2d) 1164, 1187) the Supreme Court of Texas necessarily held that the question of the sufficiency of the evidence had been effectively foreclosed from all consideration by the Court of Civil Appeals by the judgment of this Court.

If the Supreme Court of Texas had correctly interpreted the opinion of the Court, then it must have held that the question of the sufficiency of the evidence to sustain the District Court's judgment was an open question in the Court of Civil Appeals, except that that court was required to pass on that question by the application of the proper standard of proof. Whether the Supreme Court of Texas would have then held that the Court of Civil Appeals erred in reversing and rendering the decision of the District Court is a question of state law that has not yet been passed on by the Supreme Court of Texas. Even though the Supreme Court of Texas has held that under the Texas statute the trial in the District Court is a trial *de novo*, it also holds that the burden of proof is different from the ordinary burden on a plaintiff in a civil case, in that the invalidity of the order must be established by "clear and satisfactory evidence" (See Exhibit H, *infra*, p. 523, *Lone Star Gas Co. v. State*, 153 S. W. (2d) 681, 693) and by the same rules as would be applied in determining the validity of a statute. (See Exhibit

H, *infra*, p. 524, *Lone Star Gas Co. v. State*, 153 S. W. (2d) 681, 693). In other words, although the findings of the Railroad Commission are not binding on the District Court, still the Commission's order is presumptively valid and a heavier burden of proof rests on the plaintiff than in the usual civil case. Whether by applying this rule imposing a more onerous burden of proof, the Gas Company's evidence would be deemed sufficient to justify the District Court's judgment invalidating the Railroad Commission's order, is a question that the Supreme Court of Texas has held that neither it nor the Court of Civil Appeals could pass on, because of this Court's judgment. The Supreme Court of Texas should be instructed by this Court that so far as the judgment of this Court is concerned, the Court of Civil Appeals was free to pass on the sufficiency of the evidence by the application of the proper standard of proof, and that whether the Court of Civil Appeals' judgment, reversing and rendering the decision of the District Court, should be affirmed is a question for the Supreme Court of Texas to pass upon, giving due consideration to the state practice and the standard of proof approved by this Court.

CONCLUSION

The Supreme Court of Texas has reversed a well-considered judgment of the Court of Civil Appeals upholding a rate order of the Railroad Commission of Texas, entered after a "full hearing" and elaborate

findings by the Commission. The Supreme Court of Texas has held that it is bound to reverse the judgment of the Court of Civil Appeals because of the judgment of this Court. Thus, the responsibility has been placed upon this Court for disrupting the attempts of the Railroad Commission to fix rates to be charged by a public utility, serving many Texas cities and communities. We submit that the responsibility has been unjustly placed in this Court by a misconstruction of this Court's opinion and judgment. We further submit that justice requires that this error be corrected now, so that this litigation may be possibly terminated in the Supreme Court of Texas, or, at least, that it will be decided by that Court upon the correct interpretation of this Court's opinion.

For the reasons stated, we respectfully submit that the petition for mandamus in the nature of procedendo should be granted.

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EXHIBIT "A"

STATE et al. v. LONE STAR GAS CO.

No. 8,238.

Court of Civil Appeals of Texas—Austin.

BLAIR, Justice.

In the instart case this Court sustained the validity of an order of the Railroad Commission prescribing a 32 cent per thousand cubic feet city gate rate for domestic gas delivered by Lone Star Gas Company to its several allied distributing companies at the city gates of some 270 cities and towns in Texas, reversing the judgment of the District Court which declared the rate order to be invalid. See *State of Texas et al. v. Lone Star Gas Company*, Tex. Civ. App., 86 S. W. (2d) 484, 506. The Supreme Court of the United States reversed the judgment of this Court upon one ground (*Lone Star Gas Company v. State of Texas et al.*, 304 U. S. 224, 58 S. Ct. 883, 891, 82 L. Ed. 1304) as follows:

"The Court of Civil Appeals reversed the judgment upon a distinct ground. That was that appellant had not sustained its burden of proof because it had failed to make 'a proper segregation of interstate and intrastate properties, and business.' Thus, the necessity for that segregation was made the criterion. That is clearly shown both from the Court's main opinion and

its opinion upon rehearing from which we have quoted. * * *

"We think that this ruling as to the necessity of segregation, and that the sufficiency of appellant's evidence should be determined by that criterion, was erroneous. This was not a case where the segregation of properties and business was essential in order to confine the exercise of state power to its own proper province. * * * The effort at segregation came after voluminous testimony had been taken which fully presented appellant's case with respect to the value of its property and the result of its operations as an integrated system and the bearing of this evidence upon the contested rate. This proof could not be ignored because of a futile attempt, in response to the State's pressure, to find an alternative ground to support the attack upon the commission's order."

The cause was remanded to this Court "for further proceedings not inconsistent with the opinion of the Supreme Court." After receipt by this Court of the mandate of the Supreme Court, there arose a controversy as to what "further proceedings" should be had in the case and what judgment should be rendered thereon "not inconsistent with the opinion of the Supreme Court."

The Commission contends that since the Supreme Court reversed this Court's judgment solely upon its "untenable" ruling as to the necessity of the Gas Company's making a proper segregation of its interstate and intrastate property and business, and re-

manded the cause "for further proceedings not inconsistent with the opinion of the Supreme Court," this Court is required to review the "over-all" or unsegregated basis and evidence, which means the evidence relating to the Gas Company's entire integrated operating system in both Texas and Oklahoma as considered by the Commission in prescribing the rate order, and render whatever judgment is proper; and either to reverse the judgment of the District Court and render judgment sustaining the rate order as this Court did before; or to reverse the judgment of the District Court on account of the several errors of practice complained of and remand the cause for another trial on the merits, according as such over-all evidence and law and justice may require; and that either course would be entirely consistent with the opinion of the Supreme Court.

The Gas Company contends that in the "further proceedings" carrying out the mandate of the Supreme Court, this court can not review, weigh, nor consider the so-called over-all evidence and make findings thereon, and then render any judgment such findings may require, and especially the same judgment that has already been reviewed and reversed by the Supreme Court; that the Supreme Court "reversed the judgment of this Court, not because this Court failed to make findings on the over-all evidence, but because this Court set aside the findings made by the 'trier of facts' in the District Court by applying to the over-all evidence sustaining such findings, an improper test or standard to determine its sufficiency"; and that the only judgment this

Court may now render is to affirm the judgment of the District Court.

The contention now made by the Gas Company that this Court held the over-all evidence insufficient to sustain the judgment of the District Court is directly opposed to the position taken by it before the Supreme Court. There the Gas Company contended that this Court had not given any consideration, weight, nor effect whatever to the over-all evidence, but had totally disregarded same, and had based its judgment solely upon its ruling as to the necessity of the Gas Company's making a proper segregation of its interstate and intrastate property and business. So well did the Gas Company argue its point that the Supreme Court adopted that view and expressly reversed the judgment of this Court upon that sole ground.

(1) Whether this Court considered the over-all evidence sufficient to sustain the rate order as a matter of law, or considered the Gas Company's over-all evidence not sufficiently "clear and satisfactory" to sustain the District Court's judgment declaring the rate order invalid, is not material, in view of the decision of the Supreme Court that this Court did not consider the over-all evidence. That is, if this Court did so hold, such holding is now immaterial, because the Gas Company insisted and the Supreme Court held that this Court did not give any consideration, weight, nor effect whatever to the over-all evidence, but had based its judgment solely upon the "untenable" ruling as to necessity of the Gas Company's

making a segregation of its interstate and intrastate property and business; and upon "an alternative ground," and "by the application of an untenable test or standard of proof," relating only to "an alternative ground to support the attack upon the Commission's order." In view of these findings and conclusions, this Court is necessarily left free, and the Supreme Court as intended, to review the entire evidence bearing upon the over-all or unsegregated property and business of the Gas Company; and upon such review either to reverse the judgment of the District Court and render judgment sustaining the validity of the rate order as this Court did before; or to reverse the judgment of the District Court and remand the cause for another trial on account of the several errors of practice which were not discussed before; or to affirm the judgment of the District Court, according as the over-all evidence and law and justice may require.

The Supreme Court also held that the Commission based its rate order and the District Court its judgment upon the evidence relating to the over-all unsegregated basis; and that the "first and primary ground" to be determined was whether the rate was unreasonable, unjust, and confiscatory because not supported by the over-all evidence; but that this Court decided the case solely upon the alternative and improper Court did not itself determine such first and primary ground; and if this Court did not, then no reason exists why it should not now do so.

(2-4) The Supreme Court further held that the

"first and primary ground remained and the determination of the court of first instance as the trier of facts that the Commission's rate was confiscatory could not properly be set aside by the application of an untenable standard of proof (necessity of segregation) and in disregard of the evidence which had been * * * properly submitted to the jury." The Supreme Court approved the form of a special issue submitting the question of whether the rate was "unreasonable and unjust" as substantially submitting the issue of "whether the rate was confiscatory"; and then applied the rule applicable to ordinary law suits as between the individuals, to the effect that this Court could not set aside a jury finding upon conflicting evidence, and citing the cases of *Post v. State*, 106 Tex. 500, 171 S. W. 707, and *United Gas Pub. Service Co. v. Texas*, 303 U. S. 123, 58 S. Ct. 483, 82 L. Ed. 702. However, the Supreme Court specifically held that "the state is entitled to determine the procedure of its courts, so long as it provides the requisite due process"; and further held, "that a state may modify trial by jury or abolish it altogether." (58 S. Ct. 492.) Our courts have uniformly held that the scope of the judicial review of a rate order of the Railroad Commission is to determine whether it is supported by "substantial" evidence; and have required the one attacking it to show by "clear and satisfactory" evidence that it is not supported by substantial evidence; and that whether there is any "substantial" or "clear and satisfactory" evidence presents a question of law to be determined by the "judicial mind" as in any civil case, and not by a jury of laymen. In view of the fact that

such has been the consistent and uniform procedure adopted by the appellate courts of this State for almost a half century we cannot follow the contention of the Gas Company that the Supreme Court intended that this Court should affirm the judgment of the District Court upon the jury's general finding herein that the rate was "unreasonable and unjust."

Briefly, we construe the opinion of the Supreme Court as holding that in this statutory action to review and enforce the order of the Commission prescribing the 32-cent rate for gas supplied by the Gas Company to its allied distributing companies at the city gates of Texas cities and towns, which rate order was made upon consideration by the Commission of the Gas Company's properties in both Texas and Oklahoma as an integrated system, the Gas Company was entitled to have the sufficiency of its evidence judged by the criterion used by the Commission; and that the trial court's judgment based upon the jury's finding upon the same criterion that the rate was confiscatory could not be set aside by this Court upon the "untenable" and "alternative" ground and ruling as to the necessity of the Gas Company's making a proper segregation of its interstate and intrastate properties and operations. That the Supreme Court did not itself determine from the over-all evidence the legal question of whether the Gas Company had shown by "clear and satisfactory evidence" that the rate order was not based upon substantial evidence, or that the rate prescribed would not afford the Gas Company a reasonable return on the fair value of its Texas and Oklahoma properties used in

Texas public service; and that having held that this Court did not consider, weigh, nor give any effect whatever to the over-all evidence, then this Court is now entitled and required to do so, and to determine the case according as such review of the over-all evidence and law and justice may require. Any other conclusion would deprive this Court of its final jurisdiction to determine all questions of fact raised on the appeal as it is required to do under the Texas Constitution, Vernon's Ann. St. (Art. 5, § 6), which defines the jurisdiction of the Courts of Civil Appeals and provides, "that the decision of said courts shall be conclusive on all questions of fact brought before them on appeal or error."

Having on the former hearing determined that no jury question arose under the facts when viewed in the light of the established scope of a judicial review of the legislative rate order of the Commission, the Court did not discuss nor determine the procedural or practice errors asserted, which would have required that the cause be reversed and remanded. Not having jurisdiction of these questions, the Supreme Court did not determine them; and of course has not deprived this Court of its jurisdiction to now do so. And while this Court has again reached the conclusion that when viewed in the light of the over-all or unsegregated basis and evidence the legislative rate order is valid as a matter of law as against the attacks made upon it, it is thought proper to first point out the procedural or practice errors. This is not done for the purpose of now reversing and remanding the cause, but in order that the Supreme Court

of Texas or the Supreme Court of the United States might have the views of this Court on the entire case, should either be again called upon to review the decision of this Court; and in order that either may accordingly direct final disposition of this long drawn out litigation.

(5, 6) The trial court erroneously excluded the record of the proceedings before the Commission upon which it based its rate order. Such record consists of a transcript of 11,232 pages containing all of the testimony taken before the Commission relating to the over-all or unsegregated basis of operation in both Texas and Oklahoma, and to every element of a proper rate structure—rate base, expenses, revenues, depreciations, and rate of return. Since the rate order was attacked by both pleadings and evidence as being unreasonable, unjust, and confiscatory because not supported by substantial evidence, the most plausible and proper way to refute such an attack was to introduce the record of the evidence given on the hearing before the Commission. *Shupee v. Railroad Com.*, 123 Tex. 521, 73 S. W. (2d) 505, affirmed Tex. Civ. App., 57 S. W. (2d) 295; *Railroad Com. v. Galveston C. of C.*, 105 Tex. 101, 145 S. W. 573; *Railroad Com. v. Rau*, Tex. Civ. App., 45 S. W. (2d) 413; *Railroad Com. v. Lamb*, Tex. Civ. App., 81 S. W. (2d) 161; *Humble Oil & Refining Co. v. R. R. Com.*, Tex. Civ. App., 99 S. W. (2d) 401; *Railroad Com. v. Uvalde Construction Co.*, Tex. Civ. App., 49 S. W. (2d) 1113, writ refused; *Humble Oil & Refining Co. v. R. R. Com.*, 94 S. W. (2d) 1197, writ refused; *Humble Oil & Refining Co., v. R. R. Com.*, 112 S. W.

(2d) 222, 226, writ dismissed. This rule does not preclude the introduction of additional evidence pertinent to the issue in the court proceeding in the exercise of the independent jurisdiction of the court in the premises. Such is the procedure sanction in the recent case of *United Gas Public Service Co., v. Texas*, 303 U. S. 123, 58 S. Ct. 483, 82 L. Ed. 702, wherein the entire record of the proceedings before the Commission was introduced in the court proceeding and was considered along with additional evidence in sustaining the rate order of the Commission as against the attack that it was unreasonable, unjust, and confiscatory because not supported by sufficient or substantial evidence. See this Court's opinion in *United Gas Public Service v. State*, 89, S. W. (2d) 1094. See also the case of *St. Joseph Stockyards Co. v. United States*, 298, U. S. 28, 56 S. Ct. 720, 726, 80 L. Ed., 1033, wherein the only evidence before the courts was the record of the evidence presented at the legislative agency's hearing and its findings; and in sustaining the rate order the Supreme Court says:

"But this judicial duty to exercise independent judgment does not require or justify disregard of the weight which may properly attach to findings upon hearing and evidence. On the contrary, the judicial duty is performed in the light of the proceedings already had and may be greatly facilitated by the assembly and analysis of the facts in the course of the legislative determination. Judicial judgment may be none the less appropriately independent because informed and aided by the sifting procedure of an expert legislative agency."

And in the case of *United States v. Idaho*, 298 U. S. 105, 56 S. Ct. 690, 691, 80 L. Ed. 1070, wherein "the record made before the Commission was introduced in evidence; also some testimony 'which merely amplified evidence already in the record,' " the court held that "although it would have been better practice to have introduced all relevant evidence before the Commission, as appellee's counsel concede, the court did not err in admitting the additional testimony" which related to the mixed question of law and fact as to whether the trackage was a spur, and as to which Congress had not left final determination to the legislative or administrative agency.

(7) The Commission made its rate orderly and then carefully prepared findings of fact, which ably and expertly assembled, analyzed, and sifted all of the testimony before the Commission, referring to the pages of such transcript of the testimony from which the findings were taken. The Gas Company itself introduced these findings by the Commission, and then attempted to tear them down by introducing the elaborate calculations, estimates and comparisons of its experts relating to the rate structure from the over-all or unsegregated basis: but which were the same, or in substance, effect, and result the same as were used and made by these experts on the hearing before the Commission. But when the record of the evidence before the Commission, and from which its findings were made and upon which the rate order was based, was offered in rebuttal after the Gas Company had rested, the Gas Company objected, and the record of the testimony before the

Commission was excluded. Thus the Gas Company was allowed to offer evidence attempting to tear down the findings of the Commission; and the Commission was denied the right to refute the attack by the very evidence upon which it based its rate order; and under the rules above stated this was clearly error. And if any jury question were presented, then the jury was deprived of this complete transcript of the evidence adduced before the Commission bearing upon the only issue submitted to them. The record of the evidence before the Commission has been brought to this Court by a proper bill of exception.

(8) If any jury question were presented, then the trial court erred in its definition of the term "used and useful" in its charge to the jury, which reads:

"By the term 'used and useful' is meant the property of the defendant actually being used by the defendant in the production, transportation, sale, and delivery of natural gas to its customers; and also such property as has been acquired by the defendant in good faith and held for use in the reasonably near future in order to enable it to supply and furnish adequate and uninterrupted gas service."

(9, 10) Under this definition of the term "used and useful" the jury, if not absolutely required to do so, were necessarily permitted to take into consideration in arriving at its rate base the book costs of gas leaseholds in the Petrolia Field, aggregating \$687,-

781.15, for which the Commission refused to allow anything, except salvage value, because as pointed out in its findings of fact introduced by the Gas Company, the expenses of its operation substantially exceeded the value of the gas recovered when measured by the fact that the Gas Company could purchase all the gas it could use in the open market at a much smaller outlay. The question of what property was used and useful was primarily for the Commission to determine, and since it determined the question upon amply sufficient and very substantial evidence, the issue should not have been submitted to the jury.

The same is true of the Gas Company's claim to the book costs of its undeveloped gas leaseholds, aggregating \$893,291.18. The Gas Company's developed and productive leaseholds were shown to be more than adequate for its gas needs for more than 40 years to come. An adequate open market supply of cheap gas also existed. *Los Angeles Gas Co. v. R. R. Com.*, 289 U. S. 287, 53 S. Ct. 637, 77 L. Ed. 1180; *Logan Gas Co. v. Pub. Utilities Commission*, 121 Ohio St. 507, 169 N. E. 575.

The charge also authorized and necessarily directed the jury that in determining its own rate base to take into consideration the highly speculative valuation of \$7,436,650 placed by the Gas Company upon its developed and productive leaseholds; and in any event the charge effectively closed the door to the Commission's more simple and direct method of

handling production costs and properties by allowing the full value of the gas at the wellhead at the current market price on an annual or current basis, which was shown to be a proper method of determining such matters.

(11) The trial court also erred in permitting the Gas Company's witness, Ed. C. Connor, to testify in effect that he knew what percentage rate of return the Railroad Commission had always fixed for gas utilities; and that it had never fixed a rate of less than 7%. This evidence was primarily intended to bear upon the question of the reasonableness or justness of the rate as to whether 6% would afford a reasonable return. The witness made no comparable basis between the rate fixed in this case and those which had been fixed for other similar gas utilities. So far as the record shows, this was the first pipe line gate rate case the Commission of Texas ever had up to that time. And while the record shows that the Commission has in some instances allowed a slightly higher rate of return to distributing companies, such difference in allowance has reasonable factual basis. In this situation, the testimony of the expert that the Commission had never allowed less than 7%—no factual basis showing any other gas utility of a similar nature had ever been allowed 7% on a comparable basis with this Gas Company—was clearly objectionable.

(12) The trial court erred in refusing to exclude upon subsection of the Commission Volumes 7 and 8

of Exhibit 28, presented by the Gas Company's expert Connor, because, in addition to estimates, calculations, and comparisons which may have been proper, they contained the written arguments and self-serving and hearsay declarations of the expert in support thereof. Such written arguments, hypotheses and authorities cited by the expert witness in attempting to sustain his elaborate calculations were improper, and were no more admissible than if a lawyer in the case had written his argument and submitted it to the jury. *Dallas Ry. & Terminal Co. v. Curtis*, Tex. Civ. App., 53 S. W. (2d) 85; 22 C. J. 199. 'This same holding is made with respect to Exhibit No. 42 by the same witness Connor; and to Exhibits Nos. 4 to 14 both inclusive, by witness Hulcy.

(13) Exhibit No. 32 by Steinberger should have been excluded because it included in the rate base the undeveloped gas leaseholds valued at \$893,291.18 which as above held was not used nor useful in the properties dedicated to the public service.

(14, 15) Certain improper and prejudicial argument to the jury by counsel for the Gas Company with respect to who brought this suit, or was responsible for it; and that a witness for the Commission and the two assistant attorneys general who represented the Commission were responsible for the suit and for the jury's being "cooped up" during the long, dry, hot summer months, when they wanted to be away, should not have been permitted. We pretermit further discussion, because if another jury trial

should be had such argument will no doubt not be made nor permitted to be made.

(16) But having again reached the conclusion that the over-all evidence substantially sustains the rate order against the attack made upon it, we pass to a consideration of the question, which is the only question left in the case, all other questions of interstate commerce and constitutional law having been heretofore determined by both this Court and the Supreme Court. See 86 S. W. (2d) 506, and 304 U. S. 224, 58 S. Ct. 883, 82 L. Ed. 1304.

(17, 18) The specific attack made upon the rate order is that it is unreasonable, unjust, and confiscatory because too low to afford the Gas Company a reasonable return on the fair value of its properties, situated in both Texas and Oklahoma, and used in the Texas public service. In adjudicating this question, the scope of the judicial review is to determine whether the rate order is based upon "substantial evidence," the burden being placed by statute (Art. 6059) on the Gas Company to show "clear and satisfactory evidence" that the rate order is not based upon substantial evidence, or that the rate prescribed will not afford the Gas Company a reasonable return on the fair value of its properties used in the Texas public service; and the question presented is one of law to be determined by the "judicial mind," and not by a jury. In determining this scope of judicial review, our courts have been governed by two fundamental principles, which will be here pointed out.

(19) First. In the judicial review of a legislative rate order, or of any discretionary administrative order, rule, regulation, or conclusion of the Commission, the courts have regarded the Commission as occupying the position of the trial court or jury with respect to findings of fact, and have accorded to such findings the same degree of verity as is accorded to the findings of a trial judge or jury in any civil case; and in consequence the courts have established the rule that the scope of the judicial review is to determine whether the rate order, rule, regulation, or conclusion of the Commission is based upon substantial evidence. In the case of *State v. St. Louis Ry. Co.*, Tex. Civ. App., 165 S. S. 491, 495, the court held:

“The findings of fact found by the trial court as to reasonableness and public necessity were the reverse of those found by us. Ordinarily we would feel bound by the findings of fact by the trial court, unless it clearly appeared that such findings were wrong. In this case, however, we regard the Railroad Commission as occupying the place ordinarily occupied by a trial court. The duty devolved upon it primarily, to ascertain the facts. The suit before the district court upon appellees’ answer was in the nature of an appeal from the findings of the commission. The statute provides that in such suits the burden rests upon the party complaining of the orders of the commission to show, ‘by clear and satisfactory evidence,’ that the orders complained of are unjust and unreasonable. Article 6658, R. S. 1911; (*Railroad Commission v. Chamber*, 105 Tex. 101, 145 S. W. (573) 580; (*Gulf, C. &*

S. F. Ry. Co. v. Commission, 102 Tex. (338) 353, 113 S. W. 741, 116 S. W. 795. The findings of facts by the commission upon which its orders are based are to be taken as prima facie correct. Revisory power is lodged in the court, but 'it was not intended that we (nor the trial court) should substitute our judgment for that of the commission * * * ' "

In the case of *Producers' Ref. Co. v. Missouri, K. & T. R. Co.*, Tex. Com. App., 13 S. W. (2d) 679, it is held:

"The orders of the Railroad Commission are to be likened to the judgments of courts. While the commission is not a part of our judiciary system, nevertheless its duties are quasi judicial, and its functions, in many respects are those of a court. *Aransas Harbor, etc. Co. v. Taber* (Tex. Com. App.), 235 S. W. 841, *Railroad Commission of Texas v. San Antonio Compress Co.* (Tex. Civ. App.) 264 S. W. 214, writ refused; *Missouri K. & T. Ry Co. v. State* (Tex. Civ. App.) 275 S. W. 673. Whether it be treated as a tribunal of general or limited jurisdiction, the sanctity of its orders is the same. * * * It is the one tribunal with power to make rates affecting common carriers. When it establishes a rate, it necessarily finds that such rate is neither unreasonable nor discriminatory. The order, therefore, is not in violation of, but in exact keeping with, the requirements of the Constitution and statute."

And in the recent case of *Humble Oil & Refining*

Co. v. Railroad Commission, Tex. Civ. App., 112 S. W. (2d) 226, writ dismissed, the court held:

"It is a familiar rule of law that a jury's finding of fact is not reviewable in a direct proceeding on appeal, unless it is unsupported by evidence. The same is true of orders and findings of fact by a regulatory board or commission. The decision of such a board has at least as high standing in regard to finality as a verdict or finding of a jury. Texas Juris, Vol. 3, p. 1088, et seq. Such has been the uniform holding of our courts with reference to valuations found by tax and equalization boards; to orders, rules, and regulations made by the state superintendent of public schools; with regard to the granting or refusing of a permit of convenience and necessity to operate buses and trucks; and with regard to the rates of railroad companies and public utility companies. *Duck v. Peeler*, 74 Tex. 268, 11 S. W. 1111; (*Shupee v. Railroad Com.* 123 Tex. 521, 73 S. W. (2d) 505), affirmed (Tex. Civ. App.) 57 S. W. (2d) 295; *Texas & Pacific Motor Transp. Co. v. Railroad Com.*, 124 Tex. 126, 73 S. W. (2d) 509 (affirmed (Tex. Civ. App.) (*Railroad Com. of Texas v. Winkle*), 57 S. W. (2d) 287); *State v. Lone Star Gas Co.*, Texas Civ. App., 86 S. W. (2d) 161; *Producers' Refining Co. v. Missouri, K. & T. Ry. Co.*, Tex. Com. App., 13 S. W. (2d) 679."

(20-23) Where the rate order is attacked upon the ground that it is unreasonable and unjust and confiscatory because not based upon substantial evidence, as in the instant case, and the Commission is regarded as occupying the position of the trial

court or jury with respect to findings of fact upon which the rate order is based, then the rule on the statutory appeal to the court is that the trial judge shall admit and review the record of the facts before the Commission, or its findings of fact, and such additional facts as might aid in determining whether the rate order is based upon substantial evidence, and the trial judge shall determine this purely legal question as in any civil case and in the light of the burden and quantum of proof placed by the statute upon the party complaining to show by "clear and satisfactory evidence" that the rate order is not based upon substantial evidence, or that the rate prescribed will not afford a reasonable return on the fair value of the property used in the public service. The rule is one of easy application and meets every test of due process and equal protection of laws. Under it the court on appeal simply admits and reviews the record of the evidence before the Commission, or its findings of fact, and is left free, if it thinks proper in the exercise of its independent judicial judgment, to admit additional evidence pertinent to the issue of whether the rate order is based upon substantial evidence, although recent decisions indicate that the power of admitting additional evidence should be used sparingly. *St. Joseph Stockyard Co. v. U. S.*, 298 U. S. 38, 56 S. Ct. 720, 80 L. Ed. 1033; *United States v. Idaho*, 298 U. S. 105, 56 S. Ct. 690, 80 L. Ed. 1070; *Baltimore & Ohio R. R. v. United States*, 298 U. S. 349, 56 S. Ct. 797, 80 L. Ed. 1209. Compare *Acker v. United States*, 296 U. S. 426, 56 S. Ct. 824, 80 L. Ed. 1257. The rule stated is substantially, if not precisely, the rule that has been

actually applied by our courts in reviewing legislative and administrative action of the commission. We find no case reviewing a legislative rate order that was submitted to the jury in any form, and no case reviewing the administrative action of the Commission where final determination was predicated upon a jury finding. These two gas rate cases were the first to have ever been submitted to a jury, and each was submitted on a general charge and a special issue, which method has been uniformly condemned in our practice. *Cannon Ball Freight Lines v. Grasso*, 125 Tex. 154, 81 S. W. (2d) 483; Art. 2190, Vernon's Civil Statutes and Supp., and cases cited in footnote 20. And in sustaining the validity of the gas rate prescribed in said cases this Court specifically pointed out that under the scope of judicial review of rate making by the Commission adopted in this State, the jury's finding was not necessary nor material, because the question presented was one of law to be determined by the "judicial mind" as in any civil case. That is, in any civil case where the findings of fact by the trial court or jury, and upon which the judgment is based, are attacked as not being supported by "any evidence," or by "any substantial evidence," or, if the burden and quantum of proof require, by "clear and satisfactory evidence," the question presented to the appellate court is one of law for the court to determine; and the power of all appellate courts to reverse the findings of fact of the trial judge or jury on these grounds is universally recognized. And the Constitution, the statutes, and the decisions of this State fully establish the power and authority of the Courts of Civil Appeals

to review the evidence and to reverse the findings of fact of the trial judge or jury upon the grounds that same are not based upon "any or sufficient evidence," or upon "substantial evidence," or upon "clear and satisfactory evidence," as the burden and quantum of proof may require; and to then render such judgment as the trial court should have rendered under the evidence. Art 5, § 6, Constitution Vernon's Ann. St.; Art. 1856, R. S. 1925; *Owens v. Tedford*, 114 Tex. 390, 269 S. W. 418; *Electric Express Co. v. Abilon*, 110 Tex. 235, 218 S. W. 1030; *Choate v. San Antonio Ry. Co.*, 91 Tex. 406, 44 S. W. 69; *Holman v. Holman*, Tex. Com. App., 288 S. W. 413; *Gray v. Kaliski*, Tex. Com. App., 45 S. W. (2d) 157; *Westerly Supply Corp. v. State*, Tex Civ. App., 89 S. W. (2d) 244. And see particularly the following cases which hold that whether there is clear and satisfactory evidence is a question of law to be determined by the courts, and not by a jury: *Railroad Commission v. Galveston Chamber of Commerce*, 105 Tex. 101, 145 S. W. 573; *Shupee v. R. R. Com.*, 123 Tex. 521, 73 S. W. (2d) 505, affirming, Tex. Civ. App., 57 S. W. (2d) 295; *Reinhardt v. Nehring*, Tex. Com. App., 291 S. W. 873; *Carl v. Settegast*, Tex. Com. App., 237 S. W. 238; *Briscoe v. Bright's Adm'r*, Tex. Com. App., 231 S. W. 1082, wherein it is held that in treating the question of the sufficiency of the evidence to clearly and satisfactorily establish the findings upon which the judgment is based as one of law, only, the evidence must be viewed most strongly in support of the judgment of the trial court. And since the Commission is regarded as occupying the position of the trial court with respect to its findings of fact upon

which the rate order is based, then on appeal to the courts the evidence must be viewed most strongly in favor of the rate order.

The rule of regarding the Commission as occupying the position of the trial court or jury with respect to the findings of fact upon which the rate order is based is not only one of easy application and reasonable, but, as applied to the instant case, any other rule would lead to utmost absurdity with regard to the hearing before the Commission and the enormous expense necessary to such hearing. A statement from the Commission's original brief herein suffices to illustrate the point:

"After due notice, a hearing extending over a period of eight months was held. Over 11,000 pages of testimony were taken. Countless exhibits were introduced. The Company furnished the Commission with a lengthy printed brief in support of its argument. Out of the mass of data, documents, and facts, experts passed upon what trained witnesses, experts and engineers had testified to. From this vast amount of technical facts, a result was reached by men of experience. For this hearing alone the Company paid out an amount aggregating \$150,000 from the revenues derived from the ratepayers. The cost to the State was in excess of \$75,000. Is this work to go for naught simply because of the power to file a contest?"

Manifestly such was not the intention of the legislature because it declared that on the appeal to the

court the rate order shall be regarded as presumptively valid, and that the one attacking it must show by "clear and satisfactory evidence" that it is invalid or unreasonable. Art. 6059, which does not, as do some statutes, provide that the trial on the appeal to the court shall be de novo; but merely provides that "said action * * * shall be tried and determined as other civil causes." This difference is not regarded as being of controlling materiality, because in construing this and similar statutes authorizing a court review of legislative and administrative action of the Commission, the courts have uniformly held that they are intended and calculated to guard the Commission against any undue interference by the courts, and are intended to attribute a high degree of verity to the findings and conclusions of the Commission. *Railroad Com. v. Galveston C. of C.*, 105 Tex. 101, 145 S. W. 573; *Shupee v. R. R. Com.*, 123 Tex. 521, 73 S. W. (2d) 505, affirming, Tex. Civ. App., 57 S. W. (2d) 295. If such findings and conclusions of the Commission and the testimony upon which they are based are excluded on the court hearing, how could a high degree of verity be given to them; and the legislature having so provided, it necessarily intended that such evidence, findings of fact, and conclusions of the Commission should be considered on the court review, because it directed the court to attach great verity to them.

Had the trial court properly applied the aforementioned rule in the instant case, it would have greatly reduced the amount of testimony taken in the trial court, and would have conserved much time and ex-

pense necessary to the trial, because the testimony before the Commission and the testimony before the trial court was in the main and ultimate results the same. The testimony before the Commission consisted principally of numerous and voluminous calculations and estimates of six experts, two for the Commission and four for the Gas Company, and their explanations of the calculations and estimates. The Commission carefully prepared its findings of fact based upon the mass of evidence before it, interpreting the calculations and estimates of the experts; and by comparisons of their factual basis showed that the ones prepared by the Commission's experts were better supported by the facts. These findings of fact by the Commission were introduced in the trial court by the Gas Company, and then 11,000 pages of testimony was taken, explaining the numerous calculations, estimates, and comparisons, aggregating more than 20,000 pages, which were also introduced in evidence and which were prepared by the same experts who appeared before the Commission; and which calculations and estimates in effect and ultimate results were the same and were based substantially upon the same factual basis as were those presented to the Commission. One illustration will suffice here. Before the Commission, the Gas Company estimated reproduction cost new value of its over-all property used in the Texas public service (Exhibit No.6) at \$73,927,635.43 and its depreciated estimated value at \$70,156,465.73. In the trial court the same witnesses estimated reproduction cost new value of said property (Exhibit No. 28) at \$73,983,405.37, and its depreciated value (Exhibit No. 37)

at \$69,738,021.16. The book cost valuations before the Commission and the trial court were practically the same, or in substance, effect, and result the same. If the trial judge had admitted the testimony before the Commission, its findings of fact, and such additional evidence as was necessary to explain or correct them, much of the testimony and calculations and estimates before the trial court could have been excluded. Such procedure would not have deprived the parties of any evidence material to their case; and the "independent judicial duty" would have been "performed in the light of the proceedings already had" and would have been "greatly facilitated by the assembly and analysis of the facts in the course of the legislative determination" because "judicial judgment may be none the less appropriately independent because informed and aided by the sifting procedure of an expert legislative agency." *St. Joseph Stockyard Company case, supra*. The record of more than 40,000 pages, the aggregate of the testimony explaining the numerous elaborate calculations and estimates, together with such calculations and estimates, cannot be supported by any good reason or right; and frankness compels the admission that this court has not read every word and line of the calculations and estimates, and it would be too great a strain upon credulity to even assume that the jury in its less than three days deliberation on the case read every word and line of the more than 20,000 pages of estimates and calculations submitted to them.

(24-30) Second. Rate making is essentially a

legislative function, and public utility rates fixed by the commission have the same force and effect of statutes, and are subject to court review to the extent only as statutes of the same import are so subject, with the additional statutory authority of the court to determine whether the rate is unjust and unreasonable, and the inherent power of the court to determine the constitutional question of confiscation. *Missouri, K. & T. Ry. Co. v. R. R. Com.*, Tex. Civ. App., 3 S. W. (2d) 489, affirmed, *Producers' Ref. Co. v. Missouri, K. & T. R. Co.*, Tex. Com. App., 13 S. W. (2d) 679, 680. Rates fixed by the Commission are presumed to be valid, reasonable, and just until declared otherwise by a court of competent jurisdiction. *Railroad Com. v. Uvalde Construction Co.*, Tex. Civ. App., 49 S. W. (2d) 1113. In order to overcome this presumption in favor of the validity of the rate on the constitutional ground of confiscation, the burden of proof rests heavily upon the complaining party. *Dayton Power & Light Co. v. Public Utilities Com.*, 292 U. S. 290, 54 S. Ct. 647, 78 L. Ed. 1267. In order to set aside the rate as being unjust and unreasonable, the statute (Art. 6059) requires the complaining party to show "by clear and satisfactory evidence that" such rate is "unreasonable and unjust." The party attacking a rate as being unreasonable and unjust must allege facts which, if proved, would show the rate to be unjust and unreasonable as a matter of law, and to prove by clear and satisfactory evidence "which leaves no reasonable doubt in the judicial mind that the rate or rule is unjust and unreasonable." *Railroad Com. v. Galveston Chamber of Commerce*, 105 Tex. 101, 145 S. W.

573, 580; *Railroad Com. v. Weld & Neville*, 96 Tex. 394, 409, 73 S. W. 529. In advance of any actual tests of the practical result of the new rate, the court on appeal will not disturb the rate where it is based upon conflicting evidence as to valuations of property or as to any other item used as a basis for the calculation of the rate, because to do so would merely substitute the findings of the court or jury upon conflicting evidence for that of the Commission, and would therefore permit the court to exercise the legislative function of rate making. *Newton v. Consolidated Gas Co.*, 258 U. S. 165, 42 S. Ct. 264, 66 L. Ed. 538, 547. Not only are rates presumptively valid because the statute makes them so; but being legislative or official determinations they are so without a statute. *Railroad Com. v. Magnolia Pet. Co.*, 130 Tex. 484, 109 S. W. (2d) 967.

(31-34) Upon consideration of the aforementioned principles governing the scope of a judicial review of legislative or administrative action of the Commission or other governmental administrative agencies, the rule has been announced so repeatedly by the Texas courts that it has become an axiomatic principle of law that the Commission is the agency of the State with respect to the legislative or administrative power and authority vested in it, and that the courts have no power or authority to disturb any conclusion made by it within its delegated power and authority, when based upon substantial evidence. If a particular determination of the Commission or other agency is based upon substantial evidence, it is manifestly neither unreasonable, unjust, nor con-

fiscatory. In so limiting the scope of judicial review of legislative or administrative action, the Texas courts have recognized and applied the doctrine of the separation of powers of government as provided for in both the State and the Federal Constitutions. They have also recognized that legislative or administrative action is usually placed in the hands of officials who are themselves, or who are authorized to employ persons of technical competence and specialized knowledge in their particular fields of governmental activity; and that review by non-expert judges or juries of the technical fact determination involved in large areas of modern administration, even where private interests are concerned, would be neither desirable nor possible; and have frankly recognized that from a purely functional standpoint, courts are ill equipped to exercise legislative or administrative policies, and therefore do not attempt to make legislative or administrative determination, but merely to review legislative or administrative determination to require reasonableness of the determination made by the Commission or administrative body, and to prevent determination not authorized by statutory or constitutional law, and to require that the legislative or administrative determination be based upon substantial evidence. A cursory review of the legion of Texas cases reviewing such legislative or administrative determination reveals the fact that such judicial review has done its full part in reversing invalid, arbitrary, and unreasonable action of the Commission, or other administrative bodies. The instant case is a con-

crete illustration of the fact that it is neither possible nor desirable for the courts to extend review of legislative or administrative determination beyond requiring that it shall be based upon substantial evidence. Practically all of the evidence establishing the utility rate necessarily came from expert knowledge or experience not required of the non-expert judge or jury. The expert evidence given was then analyzed by the experts to determine the basic facts upon which final determination rested. The Commission afforded a full hearing, which extended over a period of more than seven months. The courts have now had the rate order for review approximately six years, and final adjudication is still in the future; and no court has under its established rules of procedure unduly delayed action in the case. In the meantime the courts have enjoined the Commission from the enforcement of its rate order. And it is in the light of this established scope of judicial review that this Court has again concluded that the rate order is valid because based upon substantial evidence, that is, the over-all or unsegregated basis and evidence; and we pass to a consideration of it.

Our findings of fact and conclusion that the rate order is based upon substantial evidence and that the Gas Company did not show by clear and satisfactory evidence that it was not based upon substantial evidence are predicated on the findings of fact of the Commission introduced in the trial court by the Gas Company; the Gas Company's testimony, estimates, and calculations adduced by the Commission in the trial court. We do not predicate our

findings and conclusion on the record of the testimony before the Commission, which was erroneously excluded by the trial court; although, with the exception of a few corrections, adjustments, and additional calculations, it is the same, or in substance, effect, and ultimate calculations and results the same as the testimony, estimates, and calculations given particularly by the Gas Company's experts in the trial court. We have also considered the estimates and calculations shown by witness Connor's Volumes 7 and 8 of Exhibits 28 and 42, and witness Hulcy's Exhibits Nos. 4 to 14, both inclusive, eliminating therefrom the written arguments, hypotheses, and authorities cited to sustain them, which we held improper to submit to a jury, if a jury question were involved.

The voluminous statement of facts and the multitude of estimates and calculations presented in the record render impossible any attempt to discuss them in detail. We must, therefore, be content with a statement of the controlling ultimate facts, and which, from our consideration of the entire record, show the principal differences between the parties, and show the rate order to be based upon substantial evidence.

Hearing before Commission. The Commission's findings of fact represent a splendid piece of work fairly and expertly done. No complaint is made and none could be made that the Gas Company was not afforded a full and fair hearing before the Commis-

sion. Thousands of pages of testimony were taken and voluminous estimates and calculations made by the Commission's and the Gas Company's experts were introduced before the Commission. These estimates and calculations were then submitted to and time given the experts of both parties for examination, analysis, and criticism. And then with the aid of its experts, the Commission by its findings of fact assembled, analyzed, and sifted the testimony, estimates, and calculations before it. The facts thus found by the Commission are based largely upon the actual history and experience of the Gas Company's business, the book costs, and the reproduction new costs of its entire properties, situated both in Texas and Oklahoma, and used in the Texas public service; rather than upon the hypothetical business and the highly speculative intangible valuations sought to be constructed and established by the Gas Company's employed experts.

The year 1931 was selected by the Commission as a basis of calculation to determine whether the rate prescribed would earn a reasonable return on the fair value of the properties used in the public service. The rate was then tested by the detailed statements of the revenues, expenses, the book costs as taken from the records of the Gas Company for the years 1927-1932, both inclusive, and also reproduction new costs for the year 1931. The Commission also had before it the same character of statements for the year ending April 30, 1933. No comparable tests were made by the Gas Company. It presented such statements for only the calendar years 1931

and 1932, and the overlapping year ending April 30, 1933. The first three years, 1927-1931, as used by the Commission, were admitted to be prosperous years, and the last three years used by the Commission were lean years, due to the general depression prevailing everywhere, and including the year 1933, which was shown to be the warmest year in the history of the Gas Company's business, although business conditions were better. Thus by shortening the period of operations, and in failing to make temperature adjustments, the Gas Company was able to show a much lower rate of return than it enjoyed for the longer six-year and overlapping year 1933 period employed by the Commission. The longer period employed by the Commission was manifestly the fairer and more reasonable test period. *United Gas Public Service Co. v. Texas*, 303 U. S. 123, 58 S. Ct. 483, 82 L. Ed. 702, Id., Tex. Civ. App., 89 S. W. (2d) 1094. Not having furnished statements covering a reasonable period of operation, the Gas Company did not show by clear and satisfactory evidence that the rate was unreasonable, unjust, or confiscatory. It selected a two and one-third-year period, which represented the lowest earnings of its entire history, due to the business depression prevailing everywhere and to warm weather prevailing in the last year; and the evidence showed a definite up swing in business conditions for the year ending March 31, 1934, as presented in the trial court. And with respect to the right to make temperature adjustments see *Los Angeles Gas & Electric Co. v. Commission*, 289 N. S. 287, 53 S. Ct. 637, 77 L. Ed. 1180. These same differences as to test periods and temperature adjustments ex-

isted in the hearing in the trial court, however, each party extended statements down to March 31, 1934, in the trial court. (*Italics underlined*)

Table I, hereto attached, represents calculations of returns based on the Commission's findings and the 32-cent gate rate.

Table II, hereto attached, represents the estimates and calculations used by the Gas Company before the Commission. The record of the testimony before the Commission containing these estimates and calculations was excluded in the District Court, on the objection of the Gas Company, and such record is before us by bill of exception. Such estimates and calculations are used here only for the purpose of comparing same with the testimony, estimates, and calculations adduced by the Gas Company in the District Court.

Hearing before District Court. Although our statutes and court decisions attribute a high degree of verity to the findings of fact by the Commission in matters of legislative rate-making, the trial judge merely permitted the findings of fact of the Commission to be introduced in evidence, excluded the record or statement of facts on which they were based, and **did not determine from them and the other evidence adduced the legal question of whether the rate order was based upon substantial evidence; but submitted such findings by the Commission to the jury with instructions that "you may consider same for the purpose for which same were admitted in evidence,—**

that is, for the purpose of assisting you (if same does assist you) in determining whether the order (rate order) * * * is unreasonable and unjust to defendant, and for no other purpose." Thousands of pages of testimony, estimates and calculations by both parties were then adduced before the District Court. Under this instruction the jury was manifestly permitted to either consider or not consider the findings of fact by the Commission, notwithstanding the statutes and decisions attribute to them a high degree of verity, and require that they be regarded as presumptively valid unless shown by clear and satisfactory evidence to be unreasonable or invalid; and the jury was manifestly permitted, upon substantially the same evidence as was before the Commission, to substitute its own findings for those of the Commission.

Table III, hereto attached, represents the estimates and calculations used by the Commission in the District Court. They are based upon the findings of fact of the Commission, and testimony, estimates, and calculations adduced by both parties in the District Court.

Table IV, hereto attached, represents the estimates and calculations adduced by the Gas Company in the District Court.

These Tables have been prepared as a basis of calculations to determine whether or not the rate prescribed by the Commission will afford a reasonable return on the value of the Company's properties sit-

uated in both Texas and Oklahoma and used in the Texas public service. It may be here observed that the Commission based its calculations upon an un-depreciated rate base while the Company, by employing the straight line method in spreading depreciation on certain large items of property, involves the use of depreciated values, although it did not consistently use depreciated values in its calculations.

The principal points of difference relate to: (1) rate base; (2) depreciation and depletion; and (3) operating expenses. The only material difference with respect to operating revenues relates to temperature adjustments and periods of calculations covered. A difference also arises with respect to what should be a reasonable rate of return.

RATE BASE

The Commission, in its determination of a rate base, found a reproduction cost new value at December 31, 1931, of \$46,246,617.53 for all of the Company's gas properties and business in Texas and Oklahoma.

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The Commission also found the average book costs of the properties inclusive of the Petrolia Field investment ranging from \$29,517,879.08 in 1927 to \$46,745,646.84 in 1930. The book cost at December 31, 1931, was shown by the Company to be \$47,776,749.63. The Commission found the Company's in-

vestment in the Petrolia Field (in the amount of \$758,619.23) to be no longer useful, and properly excluded it from the rate base. The Commission in its findings of fact stated that "The present worth or fair value of the Petrolia Field public service property is nil; and we have not, therefore, determined a reproduction cost new for leaseholds, gas wells, and field line equipment. We have included the full salvage value of all of the equipment in the Petrolia Field as part of Working Capital. We cannot condone an attempt to include worthless properties in an appraisal for the apparent purpose of increasing the Rate Base. The inclusion of these properties was questions in the hearing, the Company failed to show any justification for continuing to operate this field at a loss." The Company in no way refuted in the trial court these findings by the Commission. This leaves a difference between the Company's book cost of property used and useful and the Commission's reproduction cost new, of only \$771,512.87. In discussing this difference, the Commission stated that, "Inasmuch as a large part of the properties were built during peak price periods (years 1928 and 1929), and inasmuch as the Rate Base is 'undepreciated', the comparison is quite reasonable." So far as actual structural costs are concerned, the Company's experts found that it would cost less to reproduce numerous items of property than the amounts claimed as "book costs."

These illustrations will suffice here: In the matter of compressor stations the Company's reproduction cost new at December 31, 1931 (January 1,

1932), was \$89,000 less than their "book costs" at the same date. There appears a similar difference of \$148,000 in the item "General Office Building." Other items could be cited.

The Company presented in the hearing before the Commission a reproduction cost new rate base of \$73,927,635.43 as of December 31, 1931, (January 1, 1932), (see Table II), and presented during the trial in the District Court a corresponding figure (at January 1, 1933) of \$73,983,405.47 (see Table IV). Since the Company's figures as presented before the Commission and as submitted in the District Court are almost identical and the Commission's figures as found by it in its findings of fact and introduced without change in the District Court, the evidence before the Commission may be adverted to for comparison purposes and as showing that the trial court had substantially the same evidence before it as was before the Commission. The rate base found by the Commission was at December 31, 1931. The record shows that effective January 1, 1932, the Lone Star Gas Company "acquired" from the Lone Star Gas Corporation the properties (principally production) of the Meridian Gas Company, all, or substantially all, of which were located in Oklahoma, at a "book cost" of \$1,338,406.21. Also, as of October 1, 1932, the Lone Star Gas Company "acquired" certain other properties (principally production) from the Southern Oil Production Company, located in West Texas. The book costs attributed to the acquisition of these properties was \$966,600.11. A careful examination of the record fails to reveal any necessity for the ac-

quisition of these properties or their usefulness to the Company; or in any event the evidence is not clear and satisfactory in that regard. Mr. Hulcy, an official of the Company, gave as reason for acquiring the Meridian properties (from the parent corporation) that it was felt that they could be operated as a single unit as well as two units and that it was a logical transfer and consolidation of property. In 1931 the Company purchased 68.32% of its gas requirement and in 1932, after the acquisition of these properties, it was still purchasing 68.27% of its requirements. And the following statement clearly shows that the Company made very little use of the production properties taken over during 1932:

12 Months Ended	Total Sales MCF	Total Purchases MCF	Purchases as per cent of Sales
12/31/27	38,369,319	31,706,928	82.42
12/31/28	36,692,761	29,275,765	79.79
12/31/29	42,777,847	32,167,968	75.20
12/31/30	40,916,774	29,589,173	72.32
12/31/31	34,628,020	23,658,778	68.32
12/31/32	33,191,917	22,660,358	68.27
12/31/33	30,838,394	20,614,682	66.85
3/31/34	31,874,619	21,183,253	66.46

The appraisal presented by the Company before the Commission does not contain either of these

properties, and neither does the appraisal presented by the Commission's experts. There is not sufficient evidence in the record to warrant their consideration for any purpose. However, the Commission did consider them in its 1932 rate base by including the prorata cost of the Southern Oil and Production properties which were acquired October 1, 1932, and by setting up for the Meridian Gas Company "as a return on this property," all of the gas produced from them during 1932 at a price of fifteen cents per thousand cubic feet, in addition to the actual production expense incurred in connection with these properties during the year 1932. The amount thus allowed for the "purchase" of the gas produced from the Meridian properties was \$70,227.30, which is equal to a 6% return upon \$1,170,455. This was in addition to the allowance of the actual operating expenses incurred. Both of these properties are included at "book cost" in the "Commission's" rate bases set out in Table III for December 31, 1932, December 31, 1933, and March 31, 1934.

In arriving at its reproduction cost new of \$73,-983,405.57 (see Table IV) as of January 1, 1933, as presented in the trial court, the Company added to its valuation of its physical property the items of "Undistributed General Costs," \$9,241,074,328, "Working Capital," \$1,701,600, and "Going Concern Value," \$7,792,888. The sum of these items is \$23,-169,890. Another item going to make up the \$73,-983,405.57 is designated as "Final Engineering Records," \$765,690.35. This latter item, when added to the \$23,169,890 made a total of \$23,935,580.35.

If we subtract this from the total, we have left \$50,-047,825.22, which is only \$13,393.52 more than the book costs as claimed by the Company just the day before, December 31, 1932. It should be noted that these book costs contain the following: Meridian Gas Company, \$1,338,406.21, Southern Oil Production Company, \$966,600.11 and Petrolia Field investment, \$758,629.23, totaling \$3,063,625.55. If we subtract this \$3,063,625.55 from the \$50,547,825.22 shown above, we find \$46,984,199.67 which is surprisingly close to the Commission's reproduction cost new of \$46,246,617.53 at December 31, 1931.

The Commission included general overheads in the following amounts: "Administration and Legal Expense, Engineering and Supervision During Construction, \$2,637,264.19," "Taxes During Construction, \$9,681.29," "Interest During Construction, \$1,650,467.52," "Preliminary and Organization Expense, \$231,555.30," and "Working Capital, \$1,488,-369.91," et seq., totaling \$6,017,338.21. These are the usual items taken into consideration in determining "Going Concern Value", which will be later discussed.

In arriving at its figure of \$2,637,264.19 for "Administration and Legal Expense, Engineering and Supervision During Construction" The Commission applied 7 per cent to its reproduction cost new of the physical properties (including direct structural overheads) exclusive of leaseholds, real estate, furniture, tools, and automotive equipment. This is two and one-half per cent more than the actual cost to

the Company and about five and one-half per cent more than was capitalized, the remainder having been charged to operating expenses as incurred.

TAXES DURING CONSTRUCTION

The Company witness Connor arrived at a figure of \$178,818 for "Taxes During Construction." The witness Freese for the Commission arrived at a figure of \$9,681.29, "based upon a liberal interpretation of the historical experience of the Company." That is, he took the actual amount of taxes shown by the books to have been paid and multiplied the amount by two and arrived at the figure of \$9,681.29. The Commission stated with regard to this item "Now as a matter of fact Texas and Oklahoma political subdivisions rarely tax any work of any description under construction, and in the exceptional case the tax is usually applied to materials only." The Company did not show that they had paid any such amount of taxes as claimed.

INTEREST DURING CONSTRUCTION

The Company claimed \$4,975,933 for "Interest During Construction." This represents the estimated cost of interest incurred from the date of the incorporation of the Company until the property is put into operation—a period of three and one-half years. In connection with this item, the witness Connor also assumed that fifty per cent of the money

required in the reconstruction of the Company's properties would be raised by the issuance of first mortgage bonds, twenty-five per cent by the issuance of preferred stock, and the balance by the issuance of common stock. He further assumed an interest rate of 8%. This assumed financial structure and interest rate is contrary to the history of the Company, and finds no factual basis whatever in the actual experience of the Company. It has no bonded indebtedness of any character, and the debts owed are to the holding company and are evidenced by unsecured notes or open accounts.

The Commission's witness Freese used the actual construction periods as shown by the records of the Company and an interest rate of 6%, the rate actually paid by the Company.

PRELIMINARY AND ORGANIZATION EXPENSE

The Company witness Connor set up a claim of \$4,474,272 for "Preliminary and Organization" of which \$39,944 was transferred to "Production System Property," and "Preliminary and Organization" was reduced accordingly. The preliminary development and organization period was assumed by the witness Connor to be a year and a half; and his estimate of nearly four and one-half millions of dollars is not based upon any facts related in any way to the history of the Company for "Preliminary and

Organization" was less than \$232,000. The Commission, in making its allowance of \$231,555.30, said, "These expenses were computed on a wholesale reproduction new basis and are somewhat greater than were historically incurred." For these expenses the Company claimed nearly twenty times as much as it actually spent.

WORKING CAPITAL

The Company claimed \$1,701,600 as its requirement for "Working Capital." The Commission found that \$1,488,369.91 would be sufficient. Both the Company and the Commission computed the requirements on the primary basis of average operating expenses for forty-five days. The difference between the parties is comparatively small and arises principally from the difference in handling by them of such items as bank balances, work in progress and materials in stock held for new construction.

GOING CONCERN VALUE

(35) As preliminary, it may be stated that in determining the "Going Value" of the Gas Company's property, it was appropriate for the Commission to take into consideration the fact that the property subject to the rate order was only a part of the larger integrated operating enterprise. *Los Angeles Gas, etc., Corp. v. Commission*, 289 U. S. 287, 53 S. Ct.

637, 77 L. Ed. 1180; *Dayton P. & L. Co. v. Commission*, 292 U. S. 290, 54 S. Ct. 647, 78 L. Ed. 1267. We refer to our original opinion (86 S. W. (2d) 484, 490) for the facts showing the larger operating enterprise of which the appellee Gas Company is only a department.

Suffice it to say here that the facts show that the Lone Star Gas Corporation of Delaware, which had no permit to do business in Texas, was the owner, the absolute manager, and the alter ego of appellee Gas Company and all affiliated distributing corporations; which are Texas corporations, and which under the provisions of Arts. 6051 and 6052 are required to submit themselves to the jurisdiction of the Commission and to keep in Texas books, accounts, and records required by the Commission. The Delaware holding corporation keeps only a "dummy" set of books, which are out of date, at the Dallas, Texas, central or general office; and it refused to permit an inspection of even the "dummy" set of books, upon the ground, according to its officer Hulcy, that "the books and accounts of the Lone Star Gas Corporation are not an issue in this case at all and have nothing to do with it." The holding corporation made no showing as to the "Going Concern Value" of the properties of all corporations engaged in the single integrated enterprise, nor the pro rata going value of the appellee Gas Company's property as a part of the larger single business enterprise. The Gas Company under the plan of operation is entitled to its pro rata part of the going value of the entire enterprise. It is not an independent

enterprise itself. And since the Commission made a liberal allowance in the rate base of more than \$6,000,000 for items which are usually considered in going concern value, the Gas Company cannot complain that its property is being confiscated because it was not allowed an extra item of \$7,792,888 as going concern value. That is, the Company claimed \$7,792,888 as going concern value, in addition to more than fifteen and a quarter millions of dollars claimed for such undistributed intangibles as "Executive," "Legal," "Accounting," "Treasury," "Land," "Geological," "Purchasing," "Engineering," "Supervision," "Taxes," and "Interest," under the classification of "Undistributed General Costs," and "Preliminary and Organization" and "Working Capital" under the caption of "Non-Physical Values," all of which are in addition to the structural overheads, such as "Field Supervision," "Omissions and Contingencies," "Stores Expense," etc., amounting to millions of dollars which are included in "Physical" Properties in the Company's appraisal.

It was the testimony of the Commission's witness Freese that in evaluating the properties of the Company on a reproduction new basis, with a full allowance for all general overheads including administrative and legal expenses during construction, engineering and supervision during construction, interest during construction, and preliminary and organization expenses, with a further allowance for each working capital, he had appraised the Company's properties at their full value as a going concern in

full business operation. These general overheads, as included in the rate base by the Commission of these items which are usually considered as elements of "Going Concern Value," it included in operating expenses the following items which it stated represented the "Cost of Securing New Business," and "Costs of developing 'an advantageously situated gas supply in excess of present maximum requirements,' " (claimed by Connor to be elements of Going Concern Value) :

New Business Advertising	
Salaries	\$ 9,548.77
New Business Soliciting and	
Expense	27,969.98
Advertising Supplies and Expense	81,234.85
New Business Supplies and	
Expense	7,372.38
Dry Hole Expense	79,453.12
Cancelled and Surrendered	
Lease Expense	99,140.73
	<hr/>
	\$304,719.83

This amounts to a 6% return upon more than \$5,000,000. Since all of these intangibles claimed by the Company were included in its appraisal, the additional claim for nearly eight millions of dollars as "Going Concern Value" is untenable.

(36) The method employed by the Commission

in allowing "Going Concern Value" is fully and ably discussed in its findings of fact and is sustained by the authorities cited therein. Its experts' method of valuing all of the component parts as part of an active, going concern, with all business fully attached, personnel trained, and all undistributed general overheads and other intangible values fully allowed for, instead of making a separate lump sum estimate of going concern value, has been often approved by the Supreme Court of the United States. Said Court has also condemned the hypothetical method employed by the Gas Company. And where, as in the instant case, the going value claimed has no basis in the actual history of the company; and where because the company is a part of a larger affiliated enterprise or system, which would tend to reduce such expenses in the reproduction cost new of the property, the lump sum should not be allowed. *Dayton Power & Light Co. v. Commission*, 292 U. S. 290, 54 S. Ct. 647, 78 L. Ed. 1267; *Los Angeles G. & E. Corp. v. R R. Com. of Cal.*, 289 U. S. 287, 302, 303, 313-319, 53 S. Ct. 637, 77 L. Ed. 1180, 1191, 1196-1200, and cases there cited and reviewed; and also in *St. Joseph Stockyards Company v. United States*, 298 U. S. 38, 62-64, 56 S. Ct. 720, 80 L. Ed. 1033, 1047, 1048. And see especially *Columbus G. & E. Co. v. Pub. Ut. Com.*, 292 U. S. 398, 410-413, 54 S. Ct. 763, 78 L. Ed. 1327, 1334.

MATERIAL PRICES

The largest item of physical property is transmission line pipe, the cost of which delivered at sid-

ings the Company estimated to be \$20,954,471.01 at January 1, 1933. As the basis of obtaining prices on pipe, as well as practically all other items of physical equipment, the Company's witnesses (Biddison and Richey) claimed to have obtained from leading manufacturers quotations of the prevailing prices, with all applicable discounts applied. The Commission's witness Freese testified that his investigation showed that large lot purchases could be obtained at prices 10% to 15% or more below quoted prices. The Commission's findings of fact disclosed that quoted prices from the leading manufacturers were identical and far above the prices obtained by the Company in actual purchases. The Company, in its estimate, did not take full advantage of all discounts available to it. A good example of the results of the use of "quoted" prices rather than actual prices being currently paid (where actual prices are available) is the fact that the Company used in its appraisal a "quoted" price of \$3 per foot on more than a mile of 24" pipe which was actually purchased in 1933 for approximately \$2 per foot.

EXCAVATION COSTS

Next to the cost of pipe, the cost of excavation was the largest item going to make up the total cost of transmission line equipment. The total yardage of excavation estimated by the Company's witnesses was 3,375,162.9 cubic yards. Of this total yardage, more than eighty per cent was estimated as to volume and classified as machine, rock, and hand earth

excavation by what is known as the "barring method" of estimating trench depths and types (rock or earth) of excavation. The Commission questioned the accuracy of the results obtained by the use of the "barring method" and developed testimony to support its contention.

For example, there was cited the case where two transmission lines were laid parallel and less than one hundred feet apart for a distance of sixty-two miles. One of the lines (Line B) was laid about 1910 and the other (Line Second B) was constructed in 1929. There were no construction records available on the older line, but records were available on the newer line. Cross-examination of the Company witness Steinberger disclosed that the barring method used on the old line (Line B) produced an estimate of 11.97% hand earth excavation, 11.11% of hand rock excavation, and 76.92% machine. However, as compared with these estimates, the actual construction records revealed that on the new line (Line Second B) the percentages were; Hand Earth excavation, .83%, hand rock excavation, 9.07%, and machine excavation 90.10%. Thus the hand earth excavation estimated on Line B was more than fourteen times as great as the hand earth excavation actually encountered on Line Second B. The costs per cubic yard of various types of excavation used by the Company were as follows: machine, \$.4260, hand earth in stretches of more than two hundred feet, \$1.31, hand earth excavation on "skips" or "lifts" of less than two hundred feet \$2.138, rock excavation in Texas, \$3.897, rock excavation in Ok-

lahoma, \$3.826. The importance of properly classifying excavation into the various types is apparent. The Company's unit cost per cubic yard of the cheapest type of hand earth excavation is more than three times as high as the unit cost per cubic yard machine excavation.

Mr. Freese, the engineering witness for the Commission, testified that if the Company had determined the classification of the yardage by actual measurements and had applied the unit costs used by their own witness Biddison to the yardage so determined instead of the classification used by Biddison (and determined by the "barring method") that the cost of excavation as shown in the Company's appraisal would have been reduced in the approximate amount of \$600,000. The witness Freese applied the following unit prices to the various classes of excavation: Machine, \$.375 per cubic yard; hand earth, \$1.31; rock, \$3.50. The Commission also used as witnesses two contractors: one of whom (Mr. Robinson) lived in San Antonio, Texas, and had done much excavation work in the area traversed by the Company's transmission lines. The other (Mr. Dobson) resided in Lincoln, Nebraska, but had done excavation work in many sections of the country, including Texas. He is a graduate civil engineer with twenty-four years experience in construction work, and at the time of the trial testified that he owned thirty trenching machines. Both of these witnesses were carried over the system and furnished specifications describing the manner in which the excavation had been classified. Robinson estimated machine

excavation at \$.40 per cubic yard, hand excavation at \$1.20, and rock at \$2.90. Dobson (apparently the best qualified of all of the witnesses regarding excavation costs) estimated machine excavation at \$.285 per cubic yard, hand excavation at \$1.41 per cubic yard, and rock excavation at \$4. per cubic yard. These witnesses would have been glad to have done the work at the prices testified to by them. A similar controversy as to excavation costs arose before the Commission. Five contractors of wide experience (including Messrs. Dobson and Robinson) testified for the Commission concerning excavation and back-fill costs. The Commission adopted substantially the highest unit costs in each classification testified to by any of the five witnesses. The findings of fact by the Commission concerning these items are fully and fairly sustained by the evidence.

GAS RESERVES

The Company book cost of Production System Property at December 31, 1932, was \$5,604,756.76, including the Petrolia Field investment and the production properties acquired during 1932 from the Meridian Gas Company and the Southern Oil Producing Company. The Production System Property as set up in the Company's appraisal at January 1, 1933, introduced in District Court as part of Ex. 28, is over \$3,500,000 more than book cost. Of the total of \$9,141,858.05, thus claimed by the Company,

\$148,596 is designated as "General Supervision Allocated," \$1,404,643.25 is labelled "Undistributed General Costs." The other items are "Developed Leaseholds," \$2,681,689, "Undeveloped Leaseholds," \$893,291.28, "Gas Wells," \$3,908,424.15, "Other Production System Structures," \$9,450.29, and "Other Production Equipment," \$95,764.08. The two items of "General Supervision Allocated" and "Undistributed General Costs" account for \$1,553,239.25 of the excess of the appraised figures over the book cost figures. The principal portion of the balance of the excess, amounting to approximately two millions of dollars is included in the items of "Leaseholds" and "Gas Wells." We cannot refrain from here observing that the items of "General Supervision Allocated" and "Undistributed General Costs" are speculative, visionary, imaginery, and are purely hypothetical expenses of financing the reproduction of a business, which find no support whatever in the history or experience of the appellee Gas Company, and do not constitute clear and satisfactory evidence of such expenses or values. *Dayton P. & L. Co. v. Commission*, supra.

Gas Reserve is an important item of Production System Property. The average price paid by the Company for gas in Texas and Oklahoma was slightly in excess of six cents per MCF. The average prevailing field price in the fields where the Company produced gas was less than five cents per MCF. The Company apparently claimed as annual expenses in connection with the production of gas:

Depletion of Developed Lease-	
holds	\$146,000.00
Depletion and Depreciation of Gas	
Well Equipment	421,316.00
Production System Expenses	105,554.86
Cancelled and Surrendered	
Lease Expense	188,629.92
10% Return on Reproduction Cost	
of Production System Properties	914,185.81

making a total of \$1,775,686.59, which they would show as the cost to produce the 6,046,025 MCF of gas which the record shows was produced in 1933. This amounts to an average price per MCF, in the field, of 29.37 cents as compared with the actual average purchase price of "about six and one-third cents per thousand cubic feet" (Hulcy) over the years 1927 through 1931. The average price was less than six and one-third cents for 1932 and 1933. The highest price paid for gas in the field was fifteen cents per MCF to the parent Lone Star Gas Corporation. Unlimited quantities of gas could have been purchased by the Company in the Panhandle fields of Texas at two cents per MCF.

Mr. Hulcy, an officer of the Company, presented in evidence in the trial court an appraisal of gas reserves based essentially upon the principle of capitalization of future earnings. In this connection he assumed future annual rates of withdrawals at four or five times the rates prevailing up to the time of the trial. If the rates of the Company's withdrawals

from its own reserves are assumed to increase by three or four hundred per cent in the future, then it would have to also be assumed that the revenues to the Company would increase accordingly, or that Gas Purchase Expense would proportionately decrease. Mr. Hulcy made neither of these latter assumptions.

(37) The Commission, in its order, allowed \$4,699,205.51 as the fair value of Production System Properties (including overheads) at December 31, 1931, which is only \$190,545.73 less than the Company's undepreciated book cost at the same date. These undepreciated book costs contain Undeveloped Leaseholds in the amount of \$1,263,871.38. The evidence does not show when, if ever, these undeveloped properties will become used and useful and does not warrant their inclusion on the rate base. It is therefore clear that the Commission has included in its findings of fair value at December 31, 1931, of Production Properties approximately a million dollars (\$1,073,325.65) more than a strict interpretation of the law and evidence in the case would require. For subsequent years the "Commission's" Production System Properties are represented by its findings of December 31, 1931, plus subsequent additions at cost to the Company, including the cost of the production properties acquired from the Lone Star Gas Corporation, known as the Meridian Gas Company properties, and also the production properties acquired from the Southern Oil and Production Company, these additions at cost amounting to

nearly a million dollars. Obviously, the Commission's findings were very liberal to the Company.

But notwithstanding the fact that these after acquired production properties and undeveloped leaseholds were not shown to be used nor useful in the reasonably near future, they have been included in the calculations of Table III, thus adding some million dollars to the rate base which would have been properly excluded. *Columbus G. & F. Co. v. Commission*, 292, U. S. 398, 54 S. Ct. 763, 78 L. Ed. 1327.

Revenues

There is no material difference between the parties with regard to estimates of future revenues except as pertains to the matter of making adjustments (to rectify the results of abnormally hot weather) in the volume of gas sold for heating purposes. The Commission introduced temperature adjustments in the district court (see Table III).

The record shows that the year 1933 was the warmest year in the history of the Company; and the parties are agreed that the economic depression and these high temperatures of 1933 were contributing factors to the slump in revenues from 1930 to the end of 1933. The twelve months ended March 31, 1934, reflect the beginning of the up-swing (see Table III). The revenues for the year 1933 and the twelve months ended March 31, 1934, are less by a million dollars than the annual average covering the seven

years 1927 through 1933 and the twelve months ended March 31, 1934 (Table III). The revenues for the year 1931 were nearly one and one-half million dollars less than those for the year 1930. A considerable part of this loss of revenue occurred in connection with the industrial gas sales. However, by 1934, the evidence reflected an upturn in business and revenues for the twelve months ended March 31, 1934. And manifestly the annual revenues averaged over a reasonable number of years, including both prosperous and lean years (see Table III), is a better guide for the future than the record of only the lean years 1931, 1932 and 1933, as submitted by the Company in the trial court (see Table IV).

Depreciation.

The Company claimed an annual allowance of \$3,427,278 before the Commission for Depreciation, Depletion, and Amortization, the annual rates ranging from 1% on Taxes During Construction to 25% on General Tools (Table II). In the trial court, the Company claimed an annual amount of \$3,465,113.36 (Table IV). Before the Commission, the Company used an interest rate of 7% in applying the sinking fund method of spreading the accruals. In the trial court they used 5%. As the rate of interest applicable to the balances is reduced, the annual requirements are increased. The reduction of the interest rate from 7% before the Commission to 5% in the trial court accounts in part for the increase in the

Company's estimated annual requirements in the trial court. The \$3,022,597.54 claimed as necessary annually to take care of Depreciation and Depletion of the direct structural costs of all of its public service properties in Texas and Oklahoma as contained in the appraisal at January 1, 1933, submitted in the trial court, is approximately 6% of such reconstruction new costs as shown by the appraisal. This claim of nearly 6% per annum by the Company, when compared with their witness Biddison's testimony that the properties had depreciated only 5.74% during their entire life places the Company in an untenable position with regard to depreciation. This becomes even more apparent when it is considered further that the Company witness Biddison testified that there had been practically no change in the condition of the properties during the last two years under consideration in the trial court; and when it is further considered that the actual charges to the Reserves (cost of replacements) averaged over the seven-year period, 1927 through 1933, amounted to only \$344,871.84 per annum (Table III).

The Commission found that \$983,698.43 would be sufficient annually to cover Depreciation, Depletion, and Amortization. It used the sinking fund method and a six per cent interest rate, both in its order and in the trial court. The amount found by the Commission is nearly three times as much as the actual net charges to the reserves. The Company claims more than ten times this amount. The Commission was very liberal in its allowance for depreciation.

Expenses

In the hearing before the Commission and in the trial court the Company claimed Expenses of \$4,394,-710.63 for the year 1931, \$3,849,543.45 for 1932 and \$3,712,161.24 for the twelve months ended April 30, 1933, or an average annual amount of \$3,985,471.77.

The Commission eliminated from the 1931 Expenses, Management Fees in the amount of \$91,-375.38, and Cancelled and Surrendered Lease Expenses in the amount of \$140,090.23; and increased Dry Hole Expense by \$13,581.56. The Commission found \$4,174,807.47 as a proper allowance for operating expenses for the year 1931. Management Fees were properly eliminated by the Commission as improper charges to public service operations. See our former opinion, 86 S. W. (2d) 484. The adjustments made by the Commission in the cases of Dry Hole Expense and Cancelled and Surrendered Lease Expense resulted from the fact that five-year averages were adopted for these expenses rather than those for the year 1931. These expenses were shown to fluctuate widely from year to year. The five-year period was the better test period.

The items of "Subscriptions and Donations," \$20,-215.94; "Charitable Donations," \$9,848.67; "Advertising Supplies and Expenses," \$81,234.85; and "Maintenance of General Structures," \$24,650.71, were questioned but allowed. The Commission's allowances to Operating Expenses were very liberal.

The facts above detailed fully justify the conclusion that the Commission's rate base represents even more than the fair value of the Gas Company's property used in the public service; that the Commission has made liberal allowances for every character of operating expense, including a rate of depreciation sufficient to recapture the Gas Company's entire original investment; and that the Gas Company has been and will be in the future afforded a fair rate of return which does not approach even the border line of confiscation, and which rate of return we will now discuss.*

Rate of Return

The Company through its expert witness claimed that a net return, after Federal Income Tax, of from 8% to 15% would be necessary to enable it to survive and operate successfully. In fairness no one can honestly contend that the Company has not survived and operated successfully on the 40c rate. The testimony of the Company's witness is that the book costs increased from \$4,741,620.41 at the middle of 1910 to \$47,776,749.63 at the end of 1931—an increase of more than one thousand per cent. The "Amount Available for Depreciation and Return" increased from \$57,607.99 for the twelve months ended May 31, 1910, to \$4,605,721.83 for the year 1931—an increase of nearly eight thousand per cent. Throughout its life, the Company has enjoyed a free flow of capital at interest rates no higher than 6% and in some instances lower.

Directly opposed to these facts, the Company attempts to show (Tables II and IV) that under the 40c rate, voluntarily fixed and adhered to by it for many years, its rate of return has never been as much as 3% on its book cost and never as much as 2% on its reproduction cost new. If, as the Company's experts contend, net returns of from 8% to 15% (after Federal Income Tax) are essential to the Company's survival and successful operation, then how has the Company been able to multiply its property more than ten fold and its "Amount Available for Depreciation and Return" nearly eighty fold during its comparatively brief existence.

In fact, during its entire life and through the year 1931, the Company enjoyed under the "Amount Available for Depreciation and Return," when expressed as a weighted per cent of the book cost, 12.03%. The rates of return vary widely, ranging from less than 2% back in 1910 to more than 17% in 1926, but at no time since the first full year of operation have they fallen below 7%. Obviously, in estimating the rate of return for the future, reason and justice would not authorize taking the 12.26% as shown for 1926, or the 11.10% as shown for 1930, or the 9.54% as shown for 1922, or for any other one year; but would require that enough of the history of the past be reflected in a prediction for the future to cause the prediction to represent the normal rather than the abnormal. The Commission adopted a sufficient test period, and its action in so doing is sustained by the authorities. *United States Gas Pub. Serv. Co. v. State of Texas,*

303 U. S. 123, 58 S. Ct. 483, 82 L. Ed. 702; *West Ohio Gas Co. v. Public Ut. Comm. of Ohio*, 294 U. S. 79, 55 S. Ct. 324, 79 L. Ed. 773; and *West Ohio Gas Co. v. Public Ut. Comm. of Ohio*, 294 U. S. 63, 55 S. Ct. 316, 79 L. Ed. 761.

The Company however, both in the hearing before the Commission (Table II) and in the trial in district court (Table IV) presented only the "lean" years beginning with 1931, and attempted the impossible task of making normal predictions for the future on the basis of the short and abnormal period used. Thus the Company failed to present clear and satisfactory showing that the rate of return was too low, as was its burden.

The Commission found an annual return of 6% to be fair and reasonable. A study of Table III will show that under the 32-cent rate as set by the Commission; and Depreciation, Depletion, and Amortization calculated on the basis as found by the Commission, the rates of return on the average book costs rate bases vary from 11.01% in 1927 to 5.18% for the twelve months ended March 31, 1934, and average approximately 7%. When these same conditions are applied to the rate bases as found by the Commission, the rates of return vary from 5.40% to 11.01% and average 7.13% for the period. If these conditions are changed to the extent of using the actual average costs per annum of making replacements during the past seven years in the place of the too liberal allowances for Depreciation, Depletion, and Amortization made by the Commission, the rates

of return upon the average book costs vary from 6.48% to 11.97% and average 8.28%. If these latter conditions are applied to the rate bases as found by the Commission, the rates of return range from 6.76% to 11.97% and average 8.46% per annum over the test period.

A 6% rate of return has been held not confiscatory in the following cases: *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19, 48, 50, 29 S. Ct. 192, 53 L. Ed. 382, 15 Ann. Cas. 1034, 48 L.R.A., N. S., 1134; *Cedar Rapids Gas Light Co. v. Cedar Rapids*, 223 U. S. 655, 670, 32 S. Ct. 389, 56 L. Ed. 594; *Des Moines Gas Co. v. Des Moines*, 238 U. S. 153, 172, 35 S. Ct. 811, 59 L. Ed. 1244. See also, *Stanislaus County v. San Joaquin & King's River C. & I. Co.*, 192 U. S. 201, 216, 24 S. Ct. 241, 48 L. Ed. 406; *West Ohio Gas Co. v. Public Utilities Com.*, 128 Ohio St. 301, 191 N. E. 105, 115; *State ex rel. Capital City Water Co. v. Public Service Comm. of Missouri*, 298 Mo. 524, 252 S. W. 446, 454-459.

Since the computations in Table III show that when the more than seven-year period used in the trial court is considered, the Gas Company has earned an average rate of return of from 6.98%, and we are clear in the view that the rate order is based upon substantial evidence, and that the Gas Company did not show by clear and satisfactory evidence that it was not based upon substantial evidence, or that it would not afford a reasonable rate of return on the fair value of the properties used or useful in the public service.

We conclude that the validity of the 32-cent city gate rate prescribed by the Commission is (1) conclusively established as a matter of law and (2) factually from so overwhelming a weight and preponderance of the evidence as to require a reversal in the interest of justice.

The judgment of the trial court declaring the rate order invalid is reversed; the injunction restraining its enforcement is dissolved; and the city gate rate of 32 cents fixed by the Commission is declared to be just, reasonable, non-confiscatory, and valid in every particular.

Judgment Reversed; Injunction Dissolved; Gate Rate Prescribed by Commission Declared Valid.

TABLE I.

CALCULATION OF RATE OF RETURN—YEAR 1931
TEXAS AND OKLAHOMA OVERALL OPERATIONS—33% DOMESTIC GATE RATE
BASED UPON FINDINGS OF THE RAILROAD COMMISSION OF TEXAS
EXCLUDING EARNINGS FROM GOVERNMENT AND NORTHERN NATURAL AND USING UNDEPRECIATED
RATE BASE WHICH INCLUDES PRODUCTION PROPERTIES. ALSO SHOWING RATE BASES
AND RATES OF RETURN FOR REMAINING YEARS OF TEST PERIOD AS FOUND BY
COMMISSION IN ITS FINDINGS OF FACT

(The Revenues, Expenses, Depreciation, etc. For the Years 1927 Through 1930 were considered by the Commission but excluded by the Trial Court—hence not shown here)

FOR THE TWELVE MONTHS ENDED

	Dec. 31, 1927	Dec. 31, 1928	Dec. 31, 1929	Dec. 31, 1930	Dec. 31, 1931	Dec. 31, 1932	Six Year Average
Revenues							
Less Adjustment to Reduce Domestic Sales to 33% Per MCF.....					\$ 9,061,852.65		
Adjusted Revenues (Domestic Sales @ 33%).....					1,361,894.96		
					7,939,967.69		
Expenses					4,174,807.47(1)		
Available for Depreciation, Depletion, Amortization, Income Tax and Return.....					2,765,160.22		
Depreciation, Depletion and Amortization.....					983,698.43(2)		
Available for Fed. Income Tax & Return.....					2,781,461.79		
Federal Income Tax.....					— (5)		
Available for Return.....					2,781,461.79		
Rate Base as Found by Commission (R. 7, pp. 3321, 4016).....	\$29,517,879.08	\$35,061,928.96	\$41,340,023.12	\$46,745,646.34	46,246,617.53(3)	46,830,137.06	
Rate of Return on Rate Base Found by Commission.....	11.42%	9.70%	9.83%	7.46%	6.02%(4)	6.34%	8.46%(6)

(1) Contains the following items which unquestionably should have been eliminated by the Commission: Subscriptions and Donations \$20,215.94, Charitable Donations \$9,848.67, and contains other items totaling \$39,370.54, large portions of which were questioned by the Commission. For example, the Commission (page 9 of its opinion and order R. 7, p. 3351) is allowing the \$81,234.85 for Advertising Supplies and Expenses, claimed by the Company, said "The only example of advertising done by the Lone Star Gas Company, or by the affiliated distributing companies, and which was cited in the record, was headed '60 cents of every gas bill goes for taxes'. Advertising expense incurred for political purposes is not a legitimate charge against the public service operations of the Lone Star Gas Company. Although we are allowing the full amount set forth above for advertising supplies and expense, we do so reluctantly, (1) for the reason that any expenditure for advertising to increase sales should have been made by the distributing and not by the transmission company, and (2) for the reason that any expenditure for influencing policies of legislation is not a proper charge to operating expenses, the record failing to disclose what portion, if any, of the expenditure was of an allowable nature."

(2) Although the Commission is setting up an annual accrual to these reserves in the amount of \$983,698.43, the actual average annual charge during the seven years under review (1927 thru 1933) was only \$344,871.84.

(3) Contains undeveloped leaseholds in the amount of \$1,263,571.32. The Company was purchasing more than 70% of its gas requirements and the record does not show when (if ever) the undeveloped leaseholds will become used and useful.

(4) If the items of Subscriptions and Donations and Charitable Donations (in the sum of \$30,064.61—see footnote #1) were eliminated from Operating Expenses and if the actual costs of \$344,871.84 (see footnote #2) were used for Depreciation, Depletion and Amortization instead of the Commission's findings of \$983,698.43, and if Undeveloped Leaseholds were excluded from the rate base (see footnote #3) the amount available for return would be \$3,450,352.95, the rate base would be \$44,982,746.15, and the rate of return would be 7.67%. Also with respect to revenues, the Commission could have included the revenues from the Government and Northern Natural but excluded them on the ground that they were not permanent enough to warrant their consideration for the fixing of future rates; but the Commission did make calculations based upon these revenues which show much higher rates of return than are shown in TABLE I. (R. 7 p. 3343)

(5) R. 7 p. 3916

(6) Straight Average—Weighted Average not available.

TABLE II (C)

**CALCULATION OF RATE OF RETURN
TEXAS AND OKLAHOMA PRODUCTION AND TRANSMISSION OPERATIONS
BASED UPON COMPANY'S EVIDENCE BEFORE THE COMMISSION
40% DOMESTIC GATE RATE**

	FOR THE TWELVE MONTHS ENDED						
	Dec. 31, 1927	Dec. 31, 1928	Dec. 31, 1929	Dec. 31, 1930	Dec. 31, 1931	Dec. 31, 1932	Apr. 30, 1933
Revenues	None Submitted	None Submitted	None Submitted	None Submitted	\$ 9,302,754.87	\$ 8,851,835.18	\$ 8,513,438.48
Expenses	"	"	"	"	4,134,719.83	3,849,542.45	3,712,161.94
Available for Depreciation, Depletion, Amortiza- tion, Fed. Income Tax & Return	"	"	"	"	4,908,034.34	5,002,341.73	4,801,266.22
Depreciation, Depletion and Amortization.....	"	"	"	"	2,427,278.00	2,609,448.95(1)	2,583,341.53(1)
Available for Income Tax and Return.....	"	"	"	"	1,480,746.34	1,392,932.78	1,217,924.69
Federal Income Tax.....	"	"	"	"	302,302.41	343,835.27	316,583.40
Available for Return.....	"	"	"	"	1,178,443.93	1,049,097.51	901,341.29
Rate Base—Book Costs.....	"	"	"	"	47,776,749.63	50,034,431.70	49,976,989.27
Rates of Return on Book Costs.....	"	"	"	"	2.47%	2.10%	1.80%
Rate Bases—Reproduction New.....	"	"	"	"	72,927,635.43	None Submitted	None Submitted
Rates of Return on Reproduction New.....	"	"	"	"	1.59%		

(1) The \$340,278.00 claimed by the Company (their Ex. #21 before the Commission) as its annual requirements for Depreciation, Depletion and Amortization (As based upon the Reproduction Cost New estimate of the Company of \$72,927,635.43 shown by their Ex. #26 before the Commission at December 31, 1931) is 1.17% of the "Book Cost" Rate Base of \$47,776,749.63 at December, 31, 1931, as claimed by the Company in their Ex. #21 before the Commission. The 1.17% has been applied to the Company's "Book Cost" Rate Bases at December 31, 1932, and at April 30, 1933.

(2) Company's estimates and calculations before the Commission used here for purposes of comparison only.

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TABLE III

CALCULATION OF RATES OF RETURN
TEXAS AND OKLAHOMA PRODUCTION, GATHERING AND TRANSMISSION OPERATIONS
BASED UPON EVIDENCE USED BY THE COMMISSION IN THE DISTRICT COURT
DOMESTIC SALES ADJUSTED TO 22¢ GATE RATE
RATE BASES UNDEPRECIATED

	FOR THE TWELVE MONTHS ENDED								Annual Average
	Dec. 31, 1927	Dec. 31, 1928	Dec. 31, 1929	Dec. 31, 1930	Dec. 31, 1931	Dec. 31, 1932	Dec. 31, 1933	Mar. 31, 1934	
Revenues	\$ 9,040,274.96	\$ 9,541,976.31	\$11,088,338.49	\$10,752,143.01	\$ 9,801,862.65	\$ 8,969,188.20	\$ 7,728,309.05	\$ 7,965,978.89	\$ 9,322,354.94
Less Adjustment to Reduce Domestic Sales to 32¢ Per MCF	973,702.86	1,199,373.20	1,414,553.78	1,437,941.36	1,361,694.93	1,332,135.04	1,115,586.64	1,151,152.40	1,343,292.54
Adjusted Revenues (Domestic Sales @ 32¢)	8,046,572.00	8,342,603.11	9,673,784.71	9,314,201.65	7,939,967.69	7,637,053.16	6,612,722.41	6,814,826.49	8,032,906.40
Expenses (Less Management Fees and Donations) (R & p. 3596, 2606-07)	3,979,878.47	3,972,592.29	4,640,581.23	4,923,066.78	4,174,807.47(1)	3,751,172.07	2,517,900.39	2,491,362.92	4,066,439.88
Available for Depreciation, Depletion, Amortization, Income Tax and Return	4,066,693.53	4,370,010.82	5,033,203.51	4,391,134.86	3,765,160.22	3,775,881.09	3,094,822.02	3,323,463.57	3,977,546.47
Depreciation, Depletion and Amortization	627,865.95(2)	759,554.19(2)	879,331.23(2)	994,212.63(2)	963,698.43	1,031,720.41(3)	1,087,531.45(3)	1,082,281.55(3)	918,419.75
Available for Federal Income Tax and Return	3,438,827.58	3,610,456.64	4,153,872.28	3,396,922.26	2,791,461.79	2,744,160.68	2,007,290.57	2,241,179.11	3,061,134.74
Federal Income Tax	188,810.13	188,343.89	233,858.45	124,376.47	— (7)	—	—	—	91,822.61
Available For Return	3,250,017.45	3,422,112.75	3,920,013.83	3,272,545.79	2,781,461.79	2,744,160.68	2,007,290.57	2,241,179.11	2,969,312.13
Add Temperature Adjustment—Texas Only (R & p. 3686)	—	—	—	—	—	—	513,783.97	313,018.53	108,343.44
Available For Return—Adjusted	3,250,017.45	3,422,112.75	3,920,013.83	3,272,545.79	2,781,461.79	2,744,160.68	2,521,074.54	2,554,197.64	3,077,655.57
Rate Bases—Average Book Costs (R & p. 3617)	29,517,879.08	26,661,928.98	41,340,023.13	46,745,646.84	48,400,002.34	49,454,984.63	50,399,119.23	50,399,119.23	43,894,696.21
Rate of Return on Book Costs	11.01%	9.60%	9.49%	7.00%	6.75%	5.56%	5.12%	5.10%	6.99%(2)
Rate Base (Found By Comm. Dec. 31, 1927, 1928, 1929, 1930 and 1931. The Rate Bases shown here at Dec. 31, 1932 and 1933 and Mar. 31, 1934 represent the Commission's 1931 Rate Base Plus Additional Property purchased as Claimed by the Company.)	29,517,879.08	26,661,928.98	41,340,023.13	46,745,646.84	48,346,617.23	49,504,296.00	49,306,892.96	49,342,028.99	42,699,399.75
Rate of Return on Commission Rate Bases	11.01%	9.60%	9.49%	7.00%	6.81%	5.69%	5.24%	5.09%	7.12%(4)

Rates of Return on Average Book Costs—Determined by the Use of all factors shown above except that the actual average charges to the Reserves (344,871.84) are used instead of the "Commission's" Depletion, Depreciation & Amortization (R 6, pp. 3618-19 for Charges to Reserves)

11.97% 10.78% 10.78% • 8.39% 7.07% 6.99% 6.49% 6.19% 6.19%(1)

Rates of Return on "Commission" Rate Bases—Determined by the Use of all factors shown above except that the actual average charges to the Reserves (344,871.84) are used instead of the "Commission's" Depletion, Depreciation and Amortization. (R 6, pp. 3618-19 for charges to Reserves)

11.97% 10.78% 10.78% 8.39% 7.40% 7.07% 6.79% 6.32% 6.49%(2)

- (1) 1931 Operating Expense contains Donations but has Dry Hole Expense and Cancelled and Surrendered Lease Expense adjusted to the average of the 5 years ended December 31, 1931. (R 7, pp. 3850, 3854)
- (2) The 1931 Depreciation, Depletion and Amortization as found by the Commission (983,988.43) is 2.12707% of the 1931 rate base found by the Commission (\$46,246,617.53). This per cent has been applied to the "Commission's" rate bases of the other years.

- (3) Weighted Average—the straight average is 7.34%
- (4) Weighted Average—the straight average is 7.44%
- (5) Weighted Average—the straight average is 8.61%
- (6) Weighted Average—the straight average is 8.74%
- (7) (R 7, pp. 3916-17)

TABLE IV.

CALCULATION OF RATES OF RETURN
TEXAS AND OKLAHOMA PRODUCTION, GATHERING AND TRANSMISSION OPERATIONS
BASED UPON THE COMPANY'S EVIDENCE IN THE DISTRICT COURT
DOMESTIC SALES AT 40¢ GATE RATE

	FOR THE TWELVE MONTHS ENDED								
	Dec. 31, 1927	Dec. 31, 1928	Dec. 31, 1929	Dec. 31, 1930	Dec. 31, 1931	Dec. 31, 1932	Dec. 31, 1933	Mar. 31, 1934	May 1, 1934
Revenues	None Submitted	None Submitted	None Submitted	None Submitted	\$ 9,302,734.87(1)	\$ 8,851,886.18(2)	\$ 7,751,365.23(5)	\$ 7,989,898.7(7)	\$ 7,980,008.04(9)
Expenses	"	"	"	"	4,394,710.63(1)	3,849,543.45(2)	3,635,285.31(5)	3,610,457.27(7)	3,612,864.02(9)
Available For Depreciation, Depletion, Amortisation, Federal Income Tax and Return	"	"	"	"	4,908,024.24	5,002,341.73	4,116,079.92	4,379,441.46	4,372,804.51
Depreciation, Depletion and Amortization	"	"	"	"	None Submitted(12)	3,465,113.36(4)	None Submitted(12)	None Submitted(12)	None Submitted(12)
Available For Fed. Income Tax and Return	"	"	"	"		1,537,228.37			
Federal Income Tax	"	"	"	"	808,302.41(1)	843,835.27(3)	822,331.34(5)	859,397.97(7)	858,481.70(9)
Available For Return	"	"	"	"		1,193,383.10			
Rate Bases—Per Books	"	"	"	"	37,776,749.63(1)	50,034,431.70(3)	48,537,028.06(5)	49,572,761.09(7)	49,553,761.23(9)
Rates of Return						2.39%			
Rate Bases—Reproduction New	"	"	"	"	None Submitted	71,981,406.57(3)	None Submitted	None Submitted	75,042,787.30(11)
Rates of Return						1.61%			

- (1) (R. 7. p. 3834)
 (2) (R. 7. p. 3941)
 (3) (R. 7. p. 4115 et seq.)
 (4) (R. 8. p. 1506 et seq. R. 10, pp. 5253-54)
 (5) (R. 7. p. 3951)
 (6) (R. 7. pp. 3963-63)
 (7) (R. 7. p. 3956)
 (8) (R. 7. pp. 3967-68)
 (9) (R. 7. p. 3961)
 (10) (R. 7. pp. 3963-63)
 (11) (R. 10. p. 5241 et seq.)

(12) The Company submitted no estimates or calculations which in themselves could be used, but attempted to use the Commission's estimates and calculations as shown in its findings of fact which attempts do not fairly present the calculations made by the Commission but present rather a criticism of such estimates and calculations of the Commission by the Company.

EXHIBIT "B"

**"IN THE COURT OF CIVIL
APPEALS FOR THE THIRD SUPREME
JUDICIAL DISTRICT OF TEXAS, AT AUSTIN.**

JUDGMENT RENDERED APRIL 12, 1939

THE STATE OF TEXAS, ET AL,

v.

THE LONE STAR GAS COMPANY

No. 8238

**Appeal from the District Court of Travis County
Opinion by Associate Justice Blair**

"This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of the Court that there was error in the judgment; IT IS THEREFORE considered, adjudged and ordered that the judgment of the trial court be, and same is hereby reversed and that judgment be, and is hereby rendered for appellants, decreeing that the order of the Railroad Commission of Texas appealed from, is valid in every particular;

it is further ordered, adjudged and decreed that the injunction granted by the trial court be, and same is hereby dissolved; that the appellee, Lone Star Gas Company, pay all costs in this behalf expended, both in this Court and in the court below, and that this decision be certified below for observance."

EXHIBIT "C"

No. 8238

IN THE

Court of Civil Appeals

FOR THE

THIRD SUPREME JUDICIAL DISTRICT OF
TEXAS AT AUSTIN

STATE OF TEXAS, ET AL, Appellants,

VS.

LONE STAR GAS COMPANY, Appellee

APPELLEE'S MOTION FOR REHEARING

May It Please The Court:

Lone Star Gas Company, appellee in the above entitled and numbered cause, comes now and respectfully submits its Motion for Rehearing, and in this behalf moves the Court to set aside its judgment rendered herein on April 12, 1939, and on rehearing to affirm the judgment of the District Court declaring the rate order of the Railroad Commission

assailed herein to be unjust, unreasonable and confiscatory; and also moves the Court to correct the errors contained in its opinion, hereinafter pointed out. Appellee submits the following grounds in support of this motion:

1.

This Honorable Court erred in holding that the District Court erred in excluding from evidence upon the trial of this case the record of the evidence heard by the Railroad Commission. This holding is in substantial conflict with the prior holding of this Court in the same case, as witness the statement at page 499 of 86 S. W. (2d). It is also in conflict with the opinion of this Court in *Railroad Commission v. Rau*, 45 S. W. (2d) 413; and with the holding of this Court in *State v. St. Louis Southwestern Ry Co.*, 165 S. W. 490, 499 (on hearing).

2.

This Honorable Court erred in failing to hold that the trial in the District Court of Travis County in a case like this is essentially a trial *de novo* wherein the issue is whether upon the evidence heard in the District Court the rate order assailed is shown by "clear and satisfactory evidence" to be "unreasonable and unjust," or confiscatory.

Remarks

The applicable statute (Article 6059) gives to the complaining party the right to have the order of the

Commission judicially reviewed upon evidence heard, weighed and considered *de novo* in the reviewing court. By the statute the case is to be "tried and determined as other civil causes in said court." This clearly implies the right of the reviewing court to consider and determine the credibility of witnesses and to independently settle the involved issues of fact as well as the issues of law. By the statute the burden of *proof* devolves upon the plaintiff to show by "clear and satisfactory evidence" that the rate order complained of is unreasonable and unjust. This means the burden to show by proof brought before the reviewing court that the rate order is unjust and unreasonable. The statute clearly implies a trial *de novo*. Else, how can such a case be "tried and determined as other civil causes in said court?"

3.

This Honorable Court erred in holding, in effect, that under the law of this State the validity of a rate order such as the one in question may not properly be submitted to a jury.

4.

This Honorable Court erred in holding, in effect, that upon the trial of this case in the District Court no issue of fact for the consideration of a jury could possibly arise and that such a case cannot properly be submitted to a jury.

5.

This Honorable Court erred in holding, in effect, that the only issue that can be and is involved in a case like this is the question as to whether the Commission's rate order is sustained by substantial evidence.

6.

This Honorable Court erred in holding, in effect, that even though the proper decision of a case like the instant one ordinarily involves an issue as to the value of the utility's property used and useful in the public service, such issue of value is not one of fact, but always one of law to be determined by the "judicial mind" of the court and not by a jury.

7.

This Honorable Court erred in holding, in effect, that in the judicial review accorded by Article 6059 no power exists in the reviewing court, sitting with or without a jury, to determine the credibility of the witness and the weight to be given their testimony, and that no power exists to settle conflicts in the evidence.

Remarks

• It is submitted that these holdings of the Court involve an erroneous construction of Article 6059. It is not necessary to consider or determine what scope

of judicial review would be accorded as against such an order if this statute did not exist. The scope of judicial review is defined by the statute; and the statute awards a review in a suit to be "tried and determined as other civil causes in said court." It imposes the "burden of proof" on the plaintiff to show by "clear and satisfactory evidence" that the rate order is "unreasonable and unjust to it or them." The issue to be tried is expressly defined by the statute. It is not the issue as to whether the order is supported by "substantial evidence," as held by this Court; the issue to be tried and determined is whether the order is "unreasonable and unjust to it or them." The issue to be tried is one of fact and not merely one of law.

This Court now holds that the only question presented in such a case is the legal question as to whether the order of the Commission is based upon substantial evidence. The inquiry under this rule is directed, not to what the Commission did and not to the alleged unreasonable and unjust application of the Commission's order or action to the complaining party's property or business, but simply whether the Commission's order or action was based upon "substantial evidence." We respectfully submit that this construction of the statute in effect revises it. It amounts to revision under the guise of construction. The *legal* question or issue as to whether the Commission's order is sustained by substantial evidence is not even mentioned in the statute. By the statute the issue to be tried is a *factual* one: Does the Commission's order operate in an "unreasonable

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and unjust" way to it or them; that is, does it apply in an unreasonable and unjust way to the property or business of the complaining party?


On the statutory issue as to whether the order is "unreasonable and unjust to it or them" the complaining party assumes the "burden of proof" to furnish "clear and satisfactory evidence." There can be no "burden of proof" properly so-called if the issue is to be limited merely to a legal inquiry. To say the least of it, the expression "burden of proof" is inaptly used when it is applied to the duty or burden of proving the correctness of a legal proposition.

If the inquiry is simply one of law, how can there exist the right and duty to introduce "clear and satisfactory evidence" upon the factual issue as to whether the order is "unreasonable and unjust to it or them"? Clearly, the issue as to whether the order operates against the complainant in an unreasonable and unjust way is an issue of fact and not of law. Furthermore, no question properly can arise as to whether *evidence* is "clear and satisfactory" until the court has already considered the *testimony* of witnesses and has settled all questions relating to their credibility and the weight to be given to their *testimony*. The Court's ruling in effect denies the reviewing court the essential power to determine the credibility of witnesses and the weight to be given their testimony.

8.

This Honorable Court, having held that the scope of judicial review of the rate order in question afforded under the law of this State involves only a legal inquiry as to whether the rate order is sustained by substantial evidence, without any power on the part of the reviewing court to determine the credibility of witnesses and to weigh evidence and settle conflicts, erred in further holding that such a mode or method of judicial review affords the appellee adequate judicial review of the rate order and "due process," conformable to the requirements of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States; and having thus defined and limited the scope of judicial review, this Honorable Court erred in failing to hold that such judicial review did not constitute "due process" as required by said Fourteenth Amendment, and erred in failing to hold that said rate order, in the circumstances, could not be enforced against the appellee because of the failure of the State law to afford appellee adequate "judicial review" and adequate judicial determination of the tendered issue of confiscation, as required by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

9.

 This Honorable Court, having held, in effect, that in a suit authorized by Article 6059, the reviewing

court, in considering and determining the tendered issue of confiscation of property rights in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, is without right or authority to determine the credibility of witnesses and the weight to be given their testimony and to settle conflicts in the evidence, erred in further holding that such a judicial review is an adequate one and that the rate order in question could be constitutionally enforced against the appellee, and that such review accorded it "due process," as required by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

Remarks

It is respectfully submitted that the Court's holding in this connection is in conflict with the holding of the Supreme Court of the United States in *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 51-52, and *Ohio Water Co. v. Ben Avon Borough*, 253 U. S. 287. These cases hold definitely and clearly that the reviewing court must be vested with adequate power to independently consider the facts as well as the law; to settle the credibility of witnesses and the conflicts in the evidence; otherwise, there is a denial of adequate judicial review of a challenged rate order, in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. These cases definitely and clearly hold that if the power of the reviewing

court be confined simply to the legal issue of determining whether there is substantial evidence sustaining the challenged rate order, then adequate judicial review is denied.

10.

On page 7 of this Court's opinion appears the following statement:

"Since the rate order was attacked by both pleadings and evidence as being unreasonable, unjust, and confiscatory because not supported by substantial evidence, the most plausible and proper way to refute such an attack was to introduce the record of the evidence given on the hearing before the Commission."

If by this the Court meant that the appellee assailed the rate order as being unreasonable, unjust and confiscatory *only* "because not supported by substantial evidence," then the statement is clearly erroneous. The appellee by its pleadings and by its evidence raised the independent issue that the rate order in question in its application to appellee's property and business operations was confiscatory. This expressly appears from its Answer filed in the District Court. Appellee did not confine its attack, grounded on confiscation, to the contention or proposition that the Commission's order was not supported by "substantial evidence." It tendered the independent and *statutory* issue that the rate order was unreasonable and unjust and was also confisca-

tory in its application to appellee's property and business operations. It tendered not merely the limited issue that the order was not based upon substantial evidence but also the independent issue that the *enforcement* of the order against it would in *fact* amount to confiscation of its property, in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. It tendered also the statutory issue that the *enforcement* of the order would be "unreasonable and unjust" to it. It invoked its statutory right to have this tendered issue determined in the trial *de novo* authorized under Article 6059.

11.

This Honorable Court erred in holding, in effect, that the Supreme Court of the United States did not determine the sufficiency of the over-all evidence to support the finding of the "triers of fact" in the State trial court to the effect that the rate order in question was unjust, unreasonable and confiscatory.

12.

This Honorable Court erred in failing to hold that the Supreme Court of the United States, in deciding and holding that the judgment of this Court should be reversed because of its application of an "untenable standard of proof" in determining the sufficiency of the over-all and unsegregated evidence, necessarily found and held that said over-all or unsegregated evidence was sufficient if accepted by the

“triers of fact” to support a finding declaring the rate order in question to be unreasonable, unjust and confiscatory.

13.

This Honorable Court erred in holding that the findings and conclusions of the Supreme Court of the United States left this Court free to review the entire over-all evidence with the view of determining whether it was sufficient in law or in fact to sustain the judgment of the District Court declaring the rate order in question to be confiscatory.

Remarks

We adopt here the argument presented in our “Appellee’s Brief Showing What Disposition Should Be made of This Cause Under the Mandate Issued by the Supreme Court of the United States to This Court” as presented under the following headings, and appearing on the pages indicated:

- “2. The decision of the Supreme Court necessarily amounts to a decision that the over-all evidence was sufficient to sustain the judgment rendered in the District Court 7-16
- “3. All of appellant’s objections to the sufficiency of the over-all evidence were duly presented in the Supreme Court and were presumptively overruled by

that Court, whether discussed in its opinion or not. The scope of the Court's decision is not limited to the matters discussed in its opinion _____16-27

- "4. The opinion of the Supreme Court expressly shows that the Court held that appellee's evidence, relating to its over-all properties and operations was sufficient to sustain the jury's verdict ____27-34."

All of the objections made by the appellants in this Court to the sufficiency of appellee's so-called over-all evidence were duly presented in the Supreme Court at length and were presumptively overruled by that Court. The Supreme Court of the United States, if it followed its well settled rule of decision, could not have reversed the judgment of the District Court if that judgment was correct under any view of the record or under any theory of the case. (Argument referred to pp. 13-16). Learned counsel for the appellants presented at length to the Supreme Court of the United States the same objections to the sufficiency of the over-all evidence that are now made in this Court's opinion. Every point of argument now brought forward was brought forward in that Court and that Court was requested not to reverse the judgment of this Court because that judgment was correct even when considered in the light of the over-all evidence. This is more fully pointed out in our printed brief above referred to.

See especially the detailed references to the appel-

lants' brief in the Supreme Court of the United States set forth on pages 18 to 20 of our brief filed in this Court. For the convenience of the Court we quote as follows from our brief filed in this Court:

"The appellees in the Supreme Court, appellants here, on page 85 of their brief in that court submitted what they called their 'General Thesis' as to the confiscation issue and all related questions. We quote from this 'thesis' the following:

" 'Appellant's evidence *as a whole* was insufficient as a matter of law to demonstrate confiscation or other deprivation of Federal constitutional right and to overturn the presumed validity of the order. This becomes more clearly evident when appellant's evidence is considered in connection with, and checked by, appellees' countervailing evidence as to the compensatory character of the rate. (Our italics.)'

"The appellees in that Court, appellants here, then proceeded to present a large number of subsidiary points, each involving an objection to the sufficiency of the evidence as a whole; these points presenting the identical objections to the sufficiency of this evidence that are presented in the brief filed in this Court (their brief in the Supreme Court, pp. 85-98). Each of these points was supported by lengthy statements and arguments (brief referred to, pp. 98-200).

"It is not necessary to go into the details of these objections. They involve the point

“(a) That the appellee’s evidence as a whole was speculative and was not sufficiently ‘clear and satisfactory’ (brief referred to, pp. 87-88); and the point

“(b) That the over-all evidence was founded upon erroneous legal theories and assumptions (brief referred to, pp. 91-93); and the point

“(c) That the testimony of the Gas Company’s experts was founded upon ‘erroneous, conjectural, unfair, extravagant, speculative and untenable bases in arriving at their estimates, opinions, conclusions, valuations, and prophecies’; and the point

“(d) That said testimony and estimates should be rejected as being ‘in no real sense evidence’ (brief referred to, pp. 95-96); and the further point.

“(e) That appellee’s ‘elaborate tabulations of estimates were at war with realities’ and that appellee had ‘proved too much’ and had ‘over-shot the mark’ (brief referred to, p. 97):

“There was then the further claim that appellee’s over-all evidence was insufficient because there had been no test of the rate (brief referred to, p. 89). And it was asserted that for all of these reasons, as well as others, this Court had not erred in holding said over-all evidence to be legally insufficient and in reversing the judgment of the District Court and rendering judgment for the appellants (appellees in the Supreme Court). These various points were argued at length (see brief referred to, pp. 98-

200) and elaborate supporting tabulations were attached to the brief (pp. 196-200)." (C.C.A. brief referred to, pp. 18-20).

We further submit that the opinion of the Supreme Court of the United States expressly shows that the Court held that appellee's evidence relating to its over-all properties and operations was sufficient to sustain the jury's verdict. This expressly appears from the Court's opinion. And if such was not the Court's holding, then it reversed the judgment of this Court on a purely technical and immaterial ground. In our printed brief previously filed in this Court we have quoted at length from the opinion of the Supreme Court of the United States to show the exact nature and scope of the opinion of the Supreme Court, pp. 7-34, incl.

14.

This Honorable Court erred in the following portion of its opinion:

"The contention now made by the Gas Company that this Court held the over-all evidence insufficient to sustain the judgment of the District Court is directly opposed to the position taken by it before the Supreme Court. There the Gas Company contended that this Court had not given any consideration, weight, nor effect whatever to the over-all evidence, but had totally disregarded same, and had based its judgment solely upon its ruling as to the necessity of the Gas Company's making a proper segre-

gation of its interstate and intrastate property and business. So well did the Gas Company argue its point that the Supreme Court adopted that view and expressly reversed the judgment of this Court upon that sole ground." (Opinion, p. 3).

It is respectfully submitted that the conclusions here stated ignore the fact that the appellee (appellant there) made two contentions in the Supreme Court of the United States. It contended first that this Court erred in holding that a segregation between its interstate and intrastate commerce was necessary (Specification 10, Supreme Court Brief, p. 55.) It also presented Specification of Error 9, as follows:

"The Commission, having found that appellant's property and business was an integrated system and having valued the same as such and the Court of Civil Appeals having found that appellant was not engaged in interstate commerce in transporting and supplying gas at city gates of cities and towns in Texas, and appellant having introduced evidence showing that the order of the Commission would not permit it to receive in any of the years involved as much as a six per cent (6%) return on the fair value of its integrated public service properties, the Court of Civil Appeals erred in holding that the evidence was insufficient as a matter of law to raise an issue of fact as to the confiscatory character of the rate." (Supreme Court brief referred to, p. 55.)

Appellee's brief in the Supreme Court of the

United States shows that specific rulings of this Court with respect to the over-all evidence were challenged and discussed at length; see pages 139 to 159 of the original brief; and pages 44 et seq of Appellee's Reply Brief, in the Supreme Court. In fact, a large part of the briefs filed by the parties, respectively, in the Supreme Court were devoted to a discussion of the sufficiency of appellee's over-all evidence.

It is true, of course, that this appellee contended in the Supreme Court, and the Supreme Court held, that this Court determined the sufficiency of the over-all evidence by applying to it an "untenable standard of proof." For example, this Court said, discussing the over-all evidence as to the rate base:

"Having failed to make a proper segregation of interstate and intrastate properties, appellee did not adduce the *quantum and character of proof* necessary to establish the invalidity of the rate as being confiscatory, or unreasonable and unjust." (304 U. S. 234-235; our emphasis.)

The Court here condemned the over-all evidence as being insufficient by applying to it what the Supreme Court held to be an "untenable standard of proof."

Chief Justice Hughes further points out that the same "untenable standard of proof" was applied in holding insufficient the evidence relating to operating expenses and revenues (304 U. S. 235).

What the Supreme Court was reviewing was the holding of this Court, and not the reasoning assigned by this Court in its support. This Court held that the over-all evidence was insufficient; this Court held that appellee by relying on the over-all evidence "did not adduce the *quantum and character of proof* necessary to establish the invalidity of the rate." That was the ruling the Supreme Court was called upon to review and not merely the reason assigned by this Court in its support. (Specification 9, Supreme Court Brief, p. 55.) The fact that this Court, in the view of the Supreme Court, applied an untenable standard or test in determining the sufficiency of appellee's over-all evidence does not change the nature of the ruling made by this Court and detracts nothing from the fact that this Court condemned appellee's over-all evidence as being insufficient in "quantum and character" to support appellee's attack on the rate order. Holding in mind the distinction between the Court's *ruling* and the *reasons* assigned in its support, this Court has now again made the identical ruling that it made on the first review of the case: It has ruled that appellee's over-all evidence is insufficient as a matter of law. The only difference is that the Court has now assigned supporting *reasons* different from the reason formerly assigned.

15.

This Honorable Court erred in holding that the Supreme Court of the United States "did not itself determine such first and primary ground (here

referring to the sufficiency of the over-all evidence) and if this Court did not, then no reason exists why it should not now do so"; and in thereby holding that the Supreme Court did not determine the sufficiency as a matter of law of appellee's over-all evidence to sustain its attack on the rate order. (Opinion, p. 4)

Remarks

As we have before pointed out, the judgment and opinion of the Supreme Court necessarily import a ruling that the over-all evidence was sufficient if believed by the triers of fact, as it was believed by them; otherwise, the Supreme Court reversed the judgment of this Court upon an immaterial ground.

This Court ruled that the over-all evidence was insufficient as a matter of law to sustain appellee's attack upon the rate order. It arrived at that conclusion by applying to the over-all evidence an "untenable standard of proof" or test. But the fact that it applied the wrong standard in determining the sufficiency of the over-all evidence detracts nothing from the fact that it actually determined the sufficiency of said over-all evidence. And when the Supreme Court reversed this Court's ruling holding the over-all evidence to be insufficient as a matter of law, it necessarily held that the over-all evidence was *not* insufficient as a matter of law. Otherwise the Supreme Court's review of this case was an idle performance, amounting to nothing more than a mere waste of the Court's time.

16.

Inasmuch as the judgment and opinion of the Supreme Court of the United States (304 U. S. 224-242) necessarily import a holding by that Court that the over-all evidence if accepted by the triers of fact was sufficient in law to support a finding that the challenged rate order was confiscatory and therefore invalid under the Fourteenth Amendment to the Constitution of the United States, this Honorable Court erred in now holding that the same evidence is insufficient as a matter of law to sustain appellee's attack upon the rate order.

Remarks

Why should the Supreme Court feel called upon to consider and condemn the standard or test applied by this Court in holding appellee's over-all evidence to be insufficient as a matter of law if the record supplied other standards or tests supporting this Court's ruling? Why should the Court reverse this Court's ruling merely because the assigned reason was wrong?

17.

This Honorable Court erred in holding, in effect, that the proceedings now taken in this cause as evidence by the Court's last judgment and opinion constitute such "further proceedings" as are author-

ized by the mandate issued to this Court by the Supreme Court of the United States; and erred in holding, in effect, that the proceedings now taken are not inconsistent with the opinion of the Supreme Court of the United States.

Remarks

We here refer to our printed brief previously filed, pp. 4 to 16, inclusive.

This Court in its first opinion handed down in this case held that appellee's over-all evidence was insufficient as a matter of law to sustain its attack upon the rate order. It arrived at that conclusion by applying to such evidence what the Supreme Court later held was an "untenable standard of proof." On appeal the Supreme Court of the United States reversed the ruling of this Court, holding that the standard applied in determining the sufficiency of the over-all evidence was an improper one. To support the holding that the over-all evidence was insufficient appellants in this Court (appellees in the Supreme Court) brought forward not only the "untenable standard of proof" but also all other standards and tests available under the record. A large part of the briefs filed by the parties in the Supreme Court of the United States were devoted to a discussion of the sufficiency of the over-all evidence on its merits. Elaborate tables were prepared and submitted by the parties. The ruling of the Su-

preme Court necessarily imports the view of that Court that the over-all evidence was sufficient if accepted by the triers of fact, as it had been. It is true that the Court's opinion is devoted in main to a discussion of the applied standard, but that was only because this Court's opinion was also devoted in main to a discussion of this standard. But the Supreme Court could not have reversed the judgment of this Court merely because the applied standard was wrong. If the record supplied other standards and other tests supporting the judgment of this Court, as this Court now holds and as the appellants (appellees there) claimed in the Supreme Court, then it was the duty of the Supreme Court to consider these other standards or tests and to apply them, instead of reversing the case on an immaterial ground. And the opinion and judgment of the Supreme Court necessarily import a proper performance of this mandatory duty.

The scope and legal effect of the opinion of the Supreme Court are not limited to the single reason expressly discussed in its opinion. The Court was reviewing, not this Court's reasoning, but its rulings. This Court ruled that the over-all evidence was insufficient as a matter of law. It assigned a reason in support of this ruling. And the Supreme Court was called upon to review not merely the reason but the ruling, and the Supreme Court necessarily decided that this Court's ruling could not be supported either because of the assigned reason or for any other reason arising on the record.

18.

This Honorable Court erred in holding, in effect, that the “further proceedings not inconsistent” with the opinion of the Supreme Court involved the right and authority on the part of this Court to again render judgment holding and adjudging that appellee’s over-all evidence was insufficient as a matter of law to sustain its attack upon the rate order as being confiscatory and in violation of rights vouchsafed to it by the Fourteenth Amendment to the Constitution of the United States.

19.

This Honorable Court erred in holding, in effect, that notwithstanding the proceedings had in the Supreme Court of the United States and the mandate issued by that Court to this Court, it was entitled to again make the same ruling that it made before—that is, a ruling that the over-all evidence was insufficient as a matter of law to sustain appellee’s attack upon the rate order as being confiscatory—by simply assigning new and additional reasons in support of that ruling, in lieu of the reason previously assigned in its former opinion and condemned by the Supreme Court.

Remarks

We here refer to and adopt the discussion in our printed brief previously filed, pages 4 to 17, inclusive.

If this Court is entitled to again make the same ruling that it formerly made, that is, that the over-all evidence is insufficient as a matter of law to support appellee's challenge of the rate order as being confiscatory, and is entitled to justify its action by simply assigning new and other reasons, in lieu of the reason previously assigned and condemned by the Supreme Court, then a ruling of this Court, after being condemned by the Supreme Court, may be repeated indefinitely by merely assigning new reasons for it. In other words, if an appeal should now be taken to the Supreme Court and the ruling now made should be condemned as having been arrived at by applying improper standards, and the case should then be remanded again under the same kind of mandate—the mandate always used by the Supreme Court when the Supreme Court reverses a judgment of a State court (printed brief previously filed by appellee, pp. 4-6, incl.)—then this Court could again review the case and make the same ruling by simply assigning a new reason, or reasons, in support of the ruling.

20.

If, notwithstanding the decision of the Supreme Court, this Court is now entitled to again review independently the so-called over-all or unsegregated evidence (being the evidence that includes appellee's property and operations in both Oklahoma and Texas) and is now entitled to render whatever judgment it may believe to be proper, even the same judgment that was rendered before, then it is submitted

that such over-all evidence is clearly sufficient in law to show in a "clear and satisfactory" way that the challenged rate order is confiscatory; and it is submitted that this Honorable Court erred in holding the contrary.

Remarks

We adopt here the discussion presented in our printed brief previously filed and entitled "Appellee's Brief Showing What Disposition Should be Made of This Cause Under the Mandate Issued by the Supreme Court of the United States to This Court," pp. 38-77. In that brief, under separate heads, we have discussed the over-all evidence relating to

(a) Value of Property—Rate Base, pp. 38-41; and

(b) Annual Accruals to Reserve for Depreciation, Depletion, and Amortization, pp. 41-49; and

(c) Operating Expenses and Revenues, pp. 49-52; and

(d) Fair Rate of Return, pp. 52-55; and

(e) The Blending of the Commission's Findings with Appellee's Over-all Evidence, pp. 55-59; and

(f) Other Evidence that the Jury was entitled to consider, pp. 59-66.

We also there discussed certain questioned operating expenses, page 66; as well as the erroneous approach to this problem adopted by the appellants, pages 67-68.

We have there demonstrated as we believe, and now respectfully submit, that this over-all evidence is entirely sufficient in law at least to raise an issue of fact in support of the claim of confiscation, if not, indeed, sufficient to establish the claim of confiscation without dispute and as a matter of law. In this connection, it should be remembered that the appellants in this Court offered no evidence in the District Court in rebuttal of this over-all evidence. Instead, they relied solely upon their sponsorship of what the Supreme Court has held was an "improper standard of proof" and on an attempted geographical segregation made by them. Appellee's over-all evidence therefore stood unrebutted by any evidence heard in the District Court.

The applicable and controlling test in determining the legal sufficiency of the over-all evidence to sustain the claim of confiscation made under the Fourteenth Amendment is a Federal one. The Supreme Court has ruled that this over-all evidence satisfied the Federal and controlling rule. If there is any State rule, it must yield to the controlling Federal rule. No local rule, whether grounded in statute or merely in court decisions, defining the "quantum and character" of evidence sufficient to support a finding of *confiscation*, or defining the burden of proof that devolves upon a litigant attempting to es-

tablish *confiscation*, as distinguished from the statutory issue as to whether the order is "unreasonable and unjust to it or them," will be permitted to stand in the way of the rules that the Supreme Court has developed in rate cases arising under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. *American Railway Express Co. v. Levee*, 263 U. S. 19, 21; *Central Vermont Ry Co. v. White*, 238 U. S. 507, 512. "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers," she may not set up rules to be used in "defeating the plain assertion of Federal right." *Davis v. Wechsler*, 263 U. S. 22, 24.

21.

This Honorable Court erred in referring to the test period used by the appellee in introducing evidence before the Railroad Commission in the course of the rate investigation conducted by the Commission, and especially erred in holding in that connection that because the statements, in the view of the Court did not cover a reasonable period of operation, "the gas company did not show by clear and satisfactory evidence that the rate was unreasonable, unjust or confiscatory."

22.

The Court erred in holding, in effect, that the burden devolved upon the appellee in the course of the rate investigation made by the Railroad Commission

to introduce "clear and satisfactory evidence" that the rate later promulgated by the Commission was unreasonable, unjust or confiscatory. No particular rate being involved in the course of the investigation, no burden devolved on the appellee to justify any particular rate.

Remarks

In its opinion (p. 25) the Court criticises the appellee for using in the hearing before the Railroad Commission a test period that, in the view of the Court, was too short to afford a reasonable test, and in that connection states that because of this fact the appellee "did not show by clear and satisfactory evidence that the rate was unreasonable, unjust or confiscatory." The burden here mentioned to attack a particular rate by "clear and satisfactory evidence" did not apply in the course of the hearing before the Railroad Commission. The statute applies to the trial in the district court, conducted after the rate had been promulgated. It does not apply to the proceeding, was not a trial and was not even adversary in nature; it was merely an investigation conducted by the Commission.

The Court points to the fact that the Commission used a longer test period. That being true and the facts being thus placed before the Commission, why can it be material that some of the facts were not brought forward by the Gas Company? The Court states that the Commission made a full investigation

of the facts. If that be true, it cannot be material how the facts were developed.

23.

This Honorable Court erred (Opinion, p. 30) in holding, in effect, that the properties acquired by the Company in Oklahoma, and formerly owned by Meridian Gas Company, at a cost of \$1,338,406.21 should not be included in the rate base.

Remarks

No one questioned that these properties were used and useful; no one challenged their inclusion in the rate base. The Court's ruling in effect places upon the Company the burden of justifying its purchase and investment in every piece of property that it has acquired. The true rule, we respectfully submit, is that, in the absence of a challenge of good faith properly supported by evidence, the good faith of the Company's managers is to be presumed and a court will not substitute its judgment for theirs in respect to the prudence of a particular investment or outlay they have made.

In *West Ohio Gas Co. v. Commission*, 294 U. S. 63, 72, the Court, speaking through Mr. Justice Cardozo, said:

“Good faith is to be presumed on the part of the managers of a business. *Southwestern Bell*

Telephone Co. v. Public Service Commission of Missouri, 262 U. S. 276, 288, 289. In the absence of a showing of inefficiency or improvidence, a court will not substitute its judgment for theirs as to the measure of a prudent outlay. *Banton v. Belt Line Ry. Corp.*, 268 U. S. 413, 421; *Brooklyn Borough Gas Co. v. Prendergast*, 16 F. (2d) 615, 623; *New York & Richmond Gas Co. v. Prendergast*, 10 F. (2d) 167, 181."

24.

This Honorable Court erred in holding that properties purchased by appellee from Southern Oil & Production Company, which cost \$966,600.11, should be excluded in arriving at a proper value of its properties used and useful in the public service.

Remarks

No one challenged the propriety of including these properties in the rate base. No one claimed that they were not used and useful in the public service. The Court states in its opinion (page 30) that a careful examination of the record "fails to reveal any necessity for the acquisition of these properties or their usefulness to the Company." In reply to this it is sufficient to state that there is nothing in the record challenging the good faith of the Company's managers in acquiring these properties or showing that they were not used and useful to the Company in rendering the public service it renders. See *West Ohio Gas Company v. Commission*, *supra*.

On page 31 of its opinion the Court refers to the fact that these Meridan Gas Company and Southern Oil & Production Company properties were not included in the Commission's appraisal. The Court overlooks the fact that the appraisal was made as of January 1, 1931, and therefore could not have included properties purchased in 1932. The Court has in effect denied the right of the Company to add property to its rate base after the Commission has entered a rate order and then have the validity of the order determined on the basis of including the after-acquired property. This ignores the rule that a rate must be reasonable when made and when applied for a reasonable time in the future; and that a rate which is reasonable when made may become unreasonable because of subsequent events.

25.

This Honorable Court erred in holding that appellee had failed to discharge the burden of proof devolving upon it to show by "clear and satisfactory evidence" that the rate order was unreasonable, unjust and confiscatory in this: The state of the evidence in respect to the annual accruals to reserve for depreciation, depletion and amortization was such as to clearly give the "triers of fact" in the district court the right to accept the over-all evidence relating to these matters offered by the appellee (the appellants offering no evidence whatever in respect to these matters), and then to apply such evidence to the rate base and other relevant factors, as shown in the Commission's own findings, and on the basis

of such blending of appellee's over-all evidence and the Commission's findings to find that the prescribed rate would not yield appellee a fair return on the fair value of its property, and was therefore confiscatory.

Remarks

On pages 41 to 49, inclusive, of the printed argument filed in this Court, we have analyzed appellee's over-all evidence showing what sums were needed on account of the annual accruals to reserve to provide for depreciation, depletion and amortization. The witness Connor testified that the sum of \$3,465,123.36 was needed for this purpose. The Commission allowed \$968,066.98.

In the final analysis, the weight that should be given an estimate or determination of annual accruals for depreciation, depletion and amortization must largely depend upon the qualifications and experience of the individuals making the estimates, the extent and accuracy of the available historical data and the interpretation of the data and their application to the property. Appellee's witness Connor was well qualified and thoroughly experienced. He had access to and analyzed an impressive amount of historical data. Appellants' estimate would have provided for only 61.8% of the removals and replacements actually made by appellee up to the date of trial (R. III, 2000-2001). If appellants' rate of accrual had been applied to the property in service each year prior to the date of inquiry, rather than the property in

service at the date of inquiry, it would have been inadequate to meet actual requirements. (R., III, 2027-2033). Appellants' estimate was admittedly inadequate to meet the calculated future mortalities unless supplemented by the existence and use of a credit balance in reserve account at the date of inquiry of \$5,000,000.00 for transmission lines alone (R., III, 1861).

It was for the jury to resolve the conflicting evidence on the subject and to weigh the opposing contentions and conflicts, and to pass upon the credibility of the witnesses. In doing so they had a right to reach a conclusion favorable to appellee. The evidence clearly supports such a conclusion.

"The question of the amount which should be allowed annually for depreciation is a question of fact." *Clark's Ferry Bridge Co. v. Public Service Commission*, 291 U. S. 227.

The jury had a right to say in the light of all circumstances what amount should be allowed for annual reserve accruals. *Columbus Gas & Fuel Co. v. Public Utilities Commission*, 292 U. S. 398, 406.

These annual allowances for accrual to the depreciation, depletion and amortization reserve are aptly referred to in the decisions of the Supreme Court as "estimates." The weight to be given any such estimate depends, in main, on the qualifications and experience of the expert witness sponsoring the estimate and his opportunity to study and his know-

ledge of the underlying historical data. The commission's findings as to what would be a proper annual allowance represented only such an "estimate." The "triers of fact" were not *compelled* to accept the Commission's estimate as against appellee's estimate. No rule of law required them to accept the testimony of the Commission's experts as against the testimony of appellee's experts. What was said in the Dayton case is clearly applicable:

"Granting even that the testimony had an evidential value, it had that and nothing more. It had no such commanding quality as to apply coercion to the judgment of the appointed triers of the facts, and exclude every choice but one." (292 U. S. 301)

"Plainly opinions thus offered, even if entitled to some weight, have no such conclusive force that there is error of law refusing to follow them." (292 U. S. 299)

In the same case the Court further said in respect to the right of the triers of fact to reject opinion testimony of experts:

"Plainly in all this there has been no infringement of constitutional immunities unless a higher value has been made out by evidence too strong to be rejected. But for reasons already stated, the evidence is lacking in that high coercive power. Court and Commission were free in their discretion to reject as unsatisfactory the conflicting opinions of a group of friendly experts." (292 U. S. 302)

The Commission's expert witnesses in fact offered no testimony on this vital issue. Their testimony on this issue was based upon the "untenable standard of proof"; that is, upon an unrequired and improper segregation of appellee's properties and business. Their testimony was therefore immaterial and should not be considered for any purpose. The reasoning applied by this Court in its former opinion in condemnation of appellee's depreciation evidence upon the ground that it had been made no segregation is now applicable to the depreciation testimony of the Commission's witnesses. If it be true, as held by this Court, that evidence is immaterial that is not based on a segregation where a segregation is required, then it is equally true that evidence is immaterial that is based on a segregation where segregation is not proper and not required.

The triers of fact were not limited merely to a choice as between the two "estimates"—the estimate evidenced by the Commission's findings and that sponsored by appellee's witnesses. They were free to adopt an estimate below appellee's and yet higher than the Commission's, and in that way arrive at a reasonable and supportable conclusion that the prescribed rate was inadequate and confiscatory.

26.

This Honorable Court erred in holding that appellee had failed to discharge the burden of proving by "clear and satisfactory" evidence that the rate in question was unjust, unreasonable and confiscatory

in this: The state of the evidence in respect to what constitutes a *fair return* on the fair value of appellee's properties, used and useful in the public service, was such as to clearly warrant the triers of fact in the district court to accept as correct the evidence offered by the appellee on the issue of fair return, and then apply that evidence to the rate base and other pertinent findings made by the Railroad Commission, and on the basis of such blending of appellee's "fair return" evidence and the Commission's findings to find that the prescribed rate would not yield a fair return on the fair value of appellee's property as shown in the Commission's findings, and that it was therefore confiscatory.

Remarks

The Commission found that appellee was entitled to a minimum rate of return of 6 per cent. Appellee offered ample evidence showing that a net return of from 8 per cent to 10 per cent was reasonable and that such a return was necessary, considering the hazards of the business and in order for appellee to attract a free flow of capital into its business and insure confidence in the financial soundness thereof, and to support and maintain its credit and properly perform its service obligations.

Appellants' principal witness on rate of return, a University professor, testified that at the date of the trial *no return* at all would be reasonable, but that

over a period of ten years 5 per cent would be exceeding liberal (R., III, 1815).

What constitutes a fair rate of return is primarily the subject of expert testimony. And we think it perfectly clear that this issue of fair return presented an issue of fact to be determined in the district court by the triers of fact. There was opinion evidence on both sides. The issue was settled by determining credibility of the witnesses and the weight to be given their testimony—functions assigned exclusively to the triers of fact. As to testimony of expert witnesses, it is the general rule that such testimony has “no such commanding quality as to apply coercion to the judgment of the appointed triers of facts, and exclude every choice but one.” *Dayton Power & Light Co. v. Commission*, 292 U. S. 290, 301, per Mr. Justice Cardozo.

That the testimony of appellee’s experts, if accepted, constituted clear, definite and satisfactory evidence of confiscation cannot be denied. And with this conflict in the testimony of these equally well qualified experts resolved in favor of appellee, the rate was shown by “clear and satisfactory” evidence to be confiscatory, even on the basis of the Commission’s own findings as to rate base, operating revenues and expenses, and other relevant factors.

27.

This Honorable Court erred in holding that appellee failed to discharge the statutory burden of prov-

ing by "clear and satisfactory" evidence that the prescribed rate was unjust, unreasonable and confiscatory in this: The state of the evidence in respect to what constituted the fair value of appellee's properties used and useful in the public service—the *rate base*—was such as to clearly warrant the triers of fact in the district court, in finding that such over-all properties had a fair value equal to that claimed by appellee's witnesses, or at least much higher than the value shown in the Commission's findings, and then to consider such higher value in connection with the Commission's findings covering other relevant factors relating to the reasonableness of the prescribed rate, and on the basis of such blending of appellee's evidence relating to the rate base and the Commission's findings covering other relevant matters, to find that the prescribed rate was unjust, unreasonable and confiscatory because not affording the appellee a fair return on the fair value of its properties.

Remarks

On the issue as to a proper rate base appellee introduced in evidence an appraisal showing the reproduction cost new of its integrated operating system as of January 1, 1933. This showed \$73,983,405.57 as the cost of reproducing the integrated properties. The Commission's valuation of the same properties covered by this appraisal amounted to \$46,246,617.53.

This Court has criticised certain items included in appellee's appraisal, but it clearly appears that even with these items excluded the triers of fact could have found on the other evidence and other findings of the Commission that the rate was confiscatory.

Furthermore, there were other matters in the record impeaching the correctness of the Commission's findings. Appellants' valuation expert, Mr. Freese, in his first appraisal prepared and presented to the Railroad Commission fixed the reproduction cost new of the appellee's integrated properties in Texas and Oklahoma at \$53,005,251.39 and allocated \$47,355,114.77 of that amount to the Texas properties (R., III, 1796-1797). This is approximately 89.34% of the total value. This appraisal was not introduced in evidence by appellants, but was used by appellee at the trial for impeachment purposes. The jury had a right to take this figure into consideration in determining the value of the Texas properties if they felt the segregation formula employed by appellants at the trial was reasonable and proper. At the trial of this case the same expert testified to a valuation of \$40,256,862.39, (Appellants' Ex. 6, R., III, 2143) for the Texas properties alone as of June 15, 1934. There is a difference between the two valuations made by the same alleged expert of over \$7,000,000 for Texas properties. Appellants' Exhibit 4 shows that from January 1, 1932, to March 31, 1934, the net capital additions to public service property in Texas alone amount to \$1,500,843.28 (R., III, 2125). Prices for material and labor were higher as of June 15, 1934, than at December 31, 1933, the date of appel-

lants' appraisal in this case. Thus it is patent that the value ascribed to the Texas property by appellants' expert at June 15, 1934, is inconsistent with his prior determination. The pertinent facts would indicate a higher value at the later date because of net capital additions and increases in material prices and labor rate. The jury may have taken into consideration the disparity between the two appraisals by the same alleged expert and they may have given more weight to his first than to his second appraisal.

Other additional facts that the jury had the right to consider are presented in detail in our brief previously filed, pp. 61-66, inclusive.

28.

This Honorable Court erred in holding that appellee failed to discharge the statutory burden of proving by "clear and satisfactory evidence" that the prescribed rate was unjust, unreasonable and confiscatory in this: Accepting as correct the rate base found by the Commission as applied to appellee's over-all unsegregated properties—\$46,246,617.63—the state of the evidence in respect to other relevant factors bearing upon the reasonableness of the prescribed rate was such as to clearly entitle the triers of fact in the district court to apply such evidence to the Commission's own finding as to a proper rate base and such other evidence to find that the prescribed rate was unjust, unreasonable and confiscatory because not yielding appellee a fair return on

the fair value of its "integrated operating system" as appraised by the Commission itself.

Remarks

We have pointed out in detail in our printed brief the various views and analyses of the evidence that could have been accepted by the triers of fact in the district court as the basis for a finding supported by clear and satisfactory evidence that the prescribed rate would not yield a fair return on the fair value of appellee's "integrated operating system" as valued by the Commission itself. (Brief, pp. 41-66, inclusive.) These may be summarized:

(a) There was "clear and satisfactory evidence" showing that the depreciation allowance made by the Commission was too low, and the acceptance of the depreciation allowance sponsored by appellee's witnesses, or even a compromise allowance lower than appellee's and higher than the Commission's would have required a finding that the prescribed rate was confiscatory, even when considered in the light of the Commission's rate base, \$46,246,617.53. (Brief referred to, pp. 41-49.)

(b) The same applies to certain operating expenses and revenues. (Brief, pp. 49-55.)

(c) The same applies to the issue as to a *fair rate of return*. What constitutes a fair rate of return is primarily the subject of expert testimony.

Appellants are here contending, and the Court has in effect held, contrary to the decision of the Supreme Court of the United States in the Dayton case, that the triers of fact were compelled as a matter of law to accept as conclusive the testimony of the Commission's experts.

(d) Other blendings of the testimony are summarized and exhibited in tables in the brief referred to, pp. 56-66, inclusive.

With the utmost respect we submit that this Honorable Court's opinion evidences an erroneous approach to the problem here under discussion. The very statute under which the trial was conducted subjects the order of the Commission to a factual test to determine whether it is unjust and unreasonable as applied to the appellee's property and business. The verdict of the jury approved by the district court should be sustained by this Court if it is supported by "clear and satisfactory," or "clear and convincing," (adopting the statement of the test as made by the Supreme Court of the United States) evidence that the jury was entitled to accept. The inquiry should be simply this: Is there evidence in the record that the jury was entitled to credit as true and that is sufficient to show in a "clear and satisfactory" way that the rate was confiscatory. If such evidence is in the record, then, in view of the verdict, it should be conclusively presumed that it was accepted by the jury.

And, in determining whether the rate order has

been shown to be confiscatory by clear and satisfactory evidence, the evidence must be viewed as a whole and must be considered in the light in which the triers of fact had the right to consider and blend it; it must be given the weight that they were entitled to give it. If there is such evidence in the record, then their finding must be sustained.

The appellants in this case have made no attempt to overturn the verdict under a test or method involving a consideration of the evidence as a whole and a recognition of the jury's right to pass on the credibility of witnesses and the weight to be given their testimony. We respectfully submit that this Court has made no attempt to analyze the evidence as a whole or to demonstrate that it could not be blended with the findings in such a way as would sustain the verdict. Instead of approaching the problem in this way, parts of the evidence have been selected that were unfavorable to the verdict and therefore presumptively rejected by the jury, and these rejected parts have been blended in an effort to show that the verdict could not be sustained. We respectfully submit that this is an improper approach to the involved problem.

If this Court's opinion is to stand, then what becomes of the power and the *essential duty* in a case like this to determine the credibility of the witnesses' testimony before the reviewing court? This Court has in effect held that the reviewing court has no authority to determine the credibility of the witnesses and that if it finds a conflict in the evidence,

it must render judgment for the Commission, leaving the conflict unsettled.

The Commission of Appeals in *Briscoe v. Bright's Adm'r.*, 231 S. W. 1082, in an able opinion written by Presiding Judge McClendon, held that the requirement of clear and satisfactory evidence had no effect on the power of the triers of fact to determine all questions relating to the credibility of witnesses and the weight to be given their testimony. On that point we quote as follows:

"The fact that the witnesses who testified may not have been disinterested, or may have made conflicting statements, or that their credibility may have been attacked, are matters with which it is not our province to deal. As we understand the rule contended for, it is not violated by objections to the evidence of this character. It only requires that the terms of the contract essential to recovery be supported by evidence sufficiently clear for the court to determine what those terms were without resorting to inference or conjecture. In this, as in every other class of cases that we now recall, the credibility of the witnesses and the weight to be given to their testimony are questions solely within the province of the jury, subject, however, to be revised by the trial judge and the Court of Civil Appeals."

This Honorable Court asserts, in effect, that the limited judicial review outlined in its opinion is proper and is required because of the nature of the inquiry involved in a case like this, and because of

the inability of courts and juries to intelligently consider and solve the technical questions presented in rate cases. And at the same time the court affirms the duty of the reviewing court to determine whether the Commission's findings are supported by substantial evidence. The one inquiry is as technical as the other. If the reviewing court is unable properly to determine the issues in an independent review of the evidence, it is equally unable properly to determine whether the findings are supported by substantial evidence. This is true because if technical knowledge is required in the one instance, it is required in the other; that it, it requires the same technical knowledge to determine whether the evidence introduced before the Commission is substantial, as is required to determine the probative effect of such evidence when considered independently of the Commission's record. A court that is unable to understand technical evidence, and for that reason unable to pass an "independent judgment" upon the facts as well as the law, is equally unable, and for the same reason, to determine whether the same technical evidence introduced before the Commission is substantial in character and therefore adequate and sufficient to support a finding.

29.

This Honorable Court erred in failing to hold that the action of the District Court in excluding from evidence the record made before the Railroad Commission was at most only harmless error.

This Honorable Court erred in holding that the Commission was "denied the right to refute the attack by the very evidence upon which it based its rate order."

(These two assignments are submitted in connection with the first assignment of error, page 2 hereof).

Remarks

The Railroad Commission record was brought up by bill of exception. And this Court has found, as its opinion shows, from an inspection of the record as contained in the bill, that the evidence offered before the Commission was substantially the same as the evidence offered at the *de novo* trial. The result is that the error, if any, in excluding the record was at most only harmless error.

The Railroad Commission was not denied the right to offer the same evidence at the trial that was heard by it before it promulgated its order. It was merely denied the right to introduce the *transcript of this evidence*; it was not denied the right to place the same witnesses on the stand and adduce from them the same evidence.

The issue submitted to the jury was a statutory one: Was the order "unreasonable and unjust" in its application to appellee's property and operations?

On that issue the Commission was permitted to introduce any and all evidence, including the same evidence that was heard by it before promulgating the order. The issue as to whether the order was sustained by substantial evidence was not submitted to the jury; the applicable statute does not authorize the trial of that issue.

For further discussion see appellee's original brief filed in this Court, pages 46-51, inclusive.

31.

This Honorable Court erred in holding that the District Court erred in its judgment wherein it defined the term "used and useful."

Remarks

We here refer to and adopt the discussion presented in the original brief filed by appellee in this Court, pages 51-67, inclusive.

32.

This Honorable Court erred in holding, in effect, that the appellee was not entitled to have the jury consider for any purpose the book cost of its Petrolia Field property in arriving at the fair value of all of its property used and useful in the public service.

Remarks

We here refer to and adopt the discussion presented in the original brief filed by appellee in this Court, pages 52-55, inclusive.

33.

This Honorable Court erred in holding, in effect, that the appellee was not entitled to have the jury consider the book cost of undeveloped gas leaseholds in determining the fair and reasonable value of all of its property used and useful in the public service.

34.

This Honorable Court erred in holding, in effect, that the charge of the District Court “necessarily directed the jury” that in determining a proper rate base it should take into consideration the valuation of \$7,436,650.00 placed by the appellee upon its developed and productive leaseholds.

Remarks

We respectfully submit that the trial court's charge imposed no such coercion on the jury; it merely authorized the jury to take into consideration the properties referred to.

35.

This Honorable Court erred in holding, in effect, that the trial court and jury were required to accept the Commission's method or formula of "handling production costs and properties by allowing the full market value of the gas at the well head at the current market price," and that the trial court and jury had no right, in lieu of using such formula, to ascertain and determine from the evidence the actual reasonable and fair value of appellee's production properties and system and the actual operating costs and revenues connected therewith.

36.

This Honorable Court erred in holding that the District Court erred in permitting the appellee's witness Connor to testify, in effect, that he knew the rate of return the Railroad Commission had always fixed for gas utilities and that the rate had never been fixed below seven per cent.

Remarks

We here adopt the discussion presented in the brief first filed by appellee in this Court, pages 67-72, inclusive.

37.

This Honorable Court erred in holding that the District Court erred in failing to exclude from evi-

dence Volumes 7 and 8 of Exhibit 28, presented by the appellee's witness Connor.

38.

This Honorable Court erred in holding that the District Court erred in failing to exclude from evidence Exhibit No. 42, prepared by appellee's witness Connor.

39.

This Honorable Court erred in holding that the District Court erred in failing to exclude from evidence Exhibits Nos. 4 to 14, both inclusive, prepared by appellee's witness Hulcy.

40.

This Honorable Court erred in holding that the District Court erred in failing to exclude from evidence appellee's Exhibit 32, prepared by its witness Steinberger.

Remarks

These same exhibits, or similar exhibits, were introduced before the Railroad Commission. The Court holds that the Railroad Commission record, including of course, the exhibits, should have been introduced in evidence. It would seem that if the exhibits were admissible as a part of the Railroad Com-

mission record, they were also admissible in the way in which they were offered.

41.

This Honorable Court erred in holding that the argument of counsel for the appellee, referred to on page 12 of the opinion, was improper and prejudicial.

42.

This Honorable Court erred in finding and holding that the validity of the 32c city gate rate prescribed by the Railroad Commission was conclusively established by the evidence as a matter of law.

43.

This Honorable Court erred in holding that the appellee failed to discharge the alleged burden devolving upon it to show that the Commission's rate order was not sustained by substantial evidence. If the burden devolved upon appellee, which appellee does not concede, to demonstrate that the Commission's order was not sustained by substantial evidence, then appellee submits that the evidence was entirely sufficient to show in a clear and satisfactory way that the Commission's order was not sustained by substantial evidence. Without repetition we adopt in connection with and in support of this assignment of error, what has been presented in connection with other assignments of error previously presented applying

the "clear and satisfactory" rule to the evidence, as well as what has been said by way of argument in support of these assignments of error.

Remarks

We respectfully submit that the evidence previously analyzed, and especially under assignments of error 25 to 28, inclusive, is amply sufficient to show that the Commission's rate order was not sustained by substantial evidence. In support of this contention we also adopt here the more elaborate statements of the evidence contained in our printed brief previously filed, pages 28 to 76, inclusive. We refer especially to the tables presented in that brief showing a blending of the Commission's findings with the appellee's over-all evidence, pages 55 to 66, inclusive.

44.

This Honorable Court erred in holding that the validity of said rate order was established factually from so overwhelming a weight and preponderance of the evidence as to require a reversal of the judgment of the District Court in the interest of justice. We adopt here the statements previously made, as well as the statements presented in our printed brief and previously referred to.

45.

This Honorable Court erred in reversing the judgment of the District Court and in *rendering* final

judgment dissolving the injunction granted by the District Court and declaring the rate order of the Railroad Commission to be just, reasonable, non-confiscatory and valid in every particular.

Remarks

For all of the reasons hereinbefore pointed out and pointed out in our printed brief, to which reference has been made, we respectfully submit that the action of the Court here complained of was clearly erroneous as a matter of law. The Court's holding, properly viewed necessarily involves a denial of the right of the District Court to determine any issue of fact in a case like this; the Court's opinion denies the possibility of the existence of an issue of fact in such a case.

At all events, we submit alternatively, and only in the alternative, that it was error for the Court to render final judgment, instead of remanding the case to the District Court for another trial.

It is now submitted that in making each of the rulings complained of in this motion and in sustaining the rate order of the Railroad Commission as being non-confiscatory, as against the appellee's challenge of its validity, grounded upon the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, this Honorable Court has denied to the appellee due process of law and deprived it of

its property and of the value of the use of its property without due process of law, in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. It is further submitted that the enforcement of the rate order against the appellee, after it has obtained only the limited judicial review of the order and judicial determination of the properly tendered issue of confiscation, will deny the appellee due process of law, in violation of said Fourteenth Amendment to the Constitution of the United States.

In due time, and not later than May 15, 1939, and with the permission of the Court already obtained, the appellee will amend this motion or will submit a supplemental motion covering such matters as are not covered by this motion. Appellee will also submit a supporting argument.

Appellants are represented herein by the Honorable Gerald Mann, Attorney General of Texas, and by former Assistant Attorney General Alfred M. Scott, both residing in Austin, Texas, and upon whom service of this motion may be had.

Appellee prays that the former judgment of this Court reversing the judgment of the trial court and dissolving the injunction granted by the trial court and declaring the rate order of the Railroad Commission to be just, reasonable and non-confiscatory and valid in every particular be set aside and that judgment be rendered by this Court affirming the

judgment of the District Court. If, under the facts and the law, this relief cannot be granted appellee, then it prays in the alternative that it be granted such other relief as may be proper under the facts and the law.

Respectfully submitted,

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Attorneys for the Appellee
Lone Star Gas Company

No. 8238

IN THE
Court of Civil Appeals
FOR THE

THIRD SUPREME JUDICIAL DISTRICT
OF TEXAS AT AUSTIN

STATE OF TEXAS, ET AL., Appellants,

VS.

LONE STAR GAS COMPANY, Appellee

On Appeal from the District Court of
Travis County

**APPELLEE'S SUPPLEMENTAL MOTION
FOR REHEARING**

May It Please the Court:

Within the time prescribed by statute appellee filed its original Motion for Rehearing, and at the same time obtained permission from the Court to file

an amended Motion for Rehearing on or before May 15, 1939, presenting such additional assignments of error and points of argument as further study of the case might suggest. It now occurs to us that our original Motion for Rehearing sufficiently covers the questions that are discussed therein and that the purpose we had in mind can be better subserved by supplementing the original Motion for Rehearing. We therefore respectfully present this Supplemental Motion for Rehearing.

1.

This Honorable Court, having held that under the law of this State the scope of judicial review of the rate order in question, challenged by the appellee upon the ground that in its application to appellee's properties it was confiscatory, involved only a legal inquiry as to whether the rate order was sustained by substantial evidence without any power in the reviewing court to determine the credibility of witnesses and to weigh the evidence and settle the conflicts therein, erred in further holding that such a limited judicial review affords the appellee an adequate judicial review and due process of law complying with the requirements of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States; and, having thus held that, under the law of Texas, the scope of judicial review is thus limited, the Honorable Court erred in failing to hold that said rate order, in the circumstances, could not be enforced against the appellee because of the failure of the State law to afford the

appellee adequate judicial review and judicial determination of the duly tendered issue of confiscation, as required by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

Authorities

St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 50-52, and the authorities cited on page 49;

Ohio Water Co. v. Ben Avon Borough, 253 U. S. 287.

Argument

We here adopt our argument, separately filed, and entitled "Argument Discussing Article 6059, R. S., 1925, and the Scope of Judicial Review of Rate Orders of the Railroad Commission."

2.

This Honorable Court erred in holding that the ultimate issue to be tried in the reviewing court in a case such as this is the question of whether "the rate order is based upon substantial evidence" (Opinion, 15.) We respectfully submit that the ultimate issue is whether or not the rate order is unjust, unreasonable or confiscatory in its application to property and business of the complaining party, and that this issue is to be determined as in other civil

cases; the only difference being that the burden devolves upon the utility to affirmatively establish the issue by "clear and satisfactory" evidence.

As this case was actually tried the only issue in fact was whether the rate was *confiscatory* in its application to the property and business of appellee. The issue was thus distinctly limited in the District Court's charge to the jury. The Supreme Court of the United States so held; *Lone Star Gas Co. v. Texas*, 304 U. S. 224, 231. With the issue thus limited the case could have been tried by the District Court under its general equity jurisdiction, wholly apart from Article 6059 and even in the absence of that statute. *H. & T. C. R. Co. v. Railroad Commission*, 90 Texas 340, 353, 354; *Reagan v. Farmers' Loan and Trust Co.*, 154 U. S. 362, 392.

Argument

We here adopt our argument, separately filed, and entitled "Argument Discussing Article 6059, R. C., 1925, and the Scope of Judicial Review of Rate Orders of the Railroad Commission."

3.

This Honorable Court erred in holding that if a rate order of the Commission is based upon substantial evidence "it is manifestly neither unreasonable, unjust nor confiscatory"; and especially erred in

holding that if the order is based upon substantial evidence it, as a matter of law, is not confiscatory.

Argument

The issue of confiscation involves an inquiry into the manner in which the prescribed rate applied to the property and business of the affected utility. This inquiry is judicial in nature. That the legislative or administrative agency may hear substantial evidence supporting the rate, considered in the light of legislative standards, does not eliminate the possibility of there being produced before a judicial tribunal, later conducting an inquiry on the issue of confiscation, "clear and satisfactory" or "clear and convincing" evidence showing that the rate is confiscatory.

We here again adopt our argument, separately filed, and entitled "Argument Discussing Article 6059, R. S., 1925, and the Scope of Judicial Review of Rate Orders of the Railroad Commission."

4.

This Honorable Court erred in holding that the Commission's findings of fact are supported by substantial evidence.

5.

This Honorable Court erred in holding that the

Commission's order is supported by substantial evidence.

6.

It appearing from the Commission's findings of fact that the prescribed rate would not yield appellee a return of as much as six per cent per annum on the Commission's rate base, or upon the fair value of appellee's properties when applied under actual operating conditions, this Honorable Court erred in holding that the Commission's order was valid as against the objections that it was unjust, unreasonable and confiscatory.

7.

This Honorable Court erred in considering the *average* return for the years 1927 through March 31, 1934, as the basis for a holding that the prescribed rate was not confiscatory.

8.

This Honorable Court, having adopted the *average* return for certain years as the test to be applied in determining the issue of confiscation, erred in adding hypothetical returns of \$513,763.97 for the year 1933 and \$313,018.52 for the year ended March 31, 1934, to the actual revenues of the company. Averages are correctly arrived at only on the basis of actual experience, and by adding said hypothetical returns to the addition, already accomplished by *averaging* the returns for said year with the returns

for other years, the Court made, in effect, a duplicate addition to the actual revenue experience of the company for the two years mentioned.

9.

The Court erred in failing to hold that the rate was confiscatory upon the basis of the Commission's own findings and the actual experience of the company for the years 1931, 1932, 1933, and the twelve months ended March 31, 1934.

**STATEMENT AND ARGUMENT UNDER
ASSIGNMENTS OF ERROR FOUR TO NINE,
INCLUSIVE.**

This Honorable Court holds that the controlling issue was whether the Commission's findings were supported by substantial evidence. Assuming that this is the issue, we respectfully submit that the Court's ruling is still erroneous.

The Court concludes, supposedly on the basis of the evidence introduced in the District Court, (having expressly stated that it did not consider the Commission evidence and said evidence being before the Court only in a bill of exception showing that it was excluded) that the Commission's findings and order are supported by substantial evidence. In its effort to demonstrate that the findings and order are supported by substantial evidence, the Court sets forth various calculations in Table III. These calculations

represent a blending of evidence. Under one set-up the *average book costs* are used as a rate base; under another set-up the *Commission's rate base* is used; under one set-up the Commission's allowance for depreciation and depletion is used; under another the *average* charges against the reserve for depreciation and depletion are used. We respectfully submit that an analysis of these various calculations will demonstrate that the Commission's order was not supported by substantial evidence.

The Court relies upon the *average return* for the years 1927 through March 31, 1934, to support its conclusion. Under the first set up in Table III the *average* return for this period is shown to be 6.89 per cent, but the return for the years 1931, 1932, 1933 and the twelve months ended March 31, 1934, is shown to be materially less than 6 per cent by the Court's own calculations. These calculations therefore show that under the facts and the *actual experience* of the company the prescribed rate was confiscatory for the years last mentioned.

Just as "present confiscation is not atoned for by merely holding out the hope of a better life to come" (*West Ohio Gas Co. v. Public Utility Commission*, (No. 2,) 294 U. S. 79, 83), so present confiscation is not atoned for or excused by resurrecting the earnings of the past. Here the Court demonstrates that upon the average book cost, which does not include cash working capital, material and supplies, and does not include all of the overheads incurred in constructing the property; and after adding to actual

revenues hypothetical or imaginary revenues of \$513,768.97 for the year 1933 and \$313,018.52 for the twelve months ended March 31, 1934; and after eliminating from operating expenses all management fees and donations; and after accepting the Commission's allowance for depreciation reserve accruals, the prescribed rate would still fail to produce the minimum 6 per cent return during the years 1931, 1932, 1933 and the twelve months ended March 31, 1934.

In passing, and before further discussing the point immediately under consideration, we direct attention to the fact that the Court has clearly erred—even accepting its “average” theory as correct—in making the hypothetical temperature adjustment additions to revenues for the year 1933 and the twelve months ended March 31, 1934. *Averages*, correctly arrived at, are ended on *actual* experience for each and every year. It is manifestly erroneous after arriving at an average to then make hypothetical additions to the actual revenues of the company for a part of the period. On the same theory the company might as well contend that hypothetical *deductions* should be made from the revenues enjoyed during the better years in arriving at a correct average. As to the year 1933 and the twelve months ended March 31, 1934, the Court has made *two* additions and not merely *one*, as the table at first blush would suggest to the company's actual *revenues*. The first addition the Court has made by averaging the low revenues of the two years mentioned with the comparatively high revenues of earlier years. And

then the Court makes the second addition by use of the so-called temperature adjustment. In other words, after converting the two years mentioned into average years, the Court then makes an additional addition to actual revenues under the guise of the so-called temperature adjustment.

Now coming to the point as to whether *average experience validly* may be substituted for *actual experience* during the last three and one-half years used in the Court's table. May the company be compelled to suffer confiscation during the three and one-half years mentioned merely because its actual earnings for prior years were adequate? We think not. The Court properly may not sustain a rate that is presently confiscatory by averaging earnings over an eight-year period.

It is well settled that *earnings* of the past cannot be used to sustain a confiscatory rate of any more than *deficits* of the past can be used to invalidate a rate which is presently compensatory. *Knoxville v. Knoxville Water Co.*, 212 U. S. 1; *Galveston Electric Co. v. Galveston*, 258 U. S. 388; *Georgia Ry. & Power Co. v. Railroad Commission*, 262 U. S. 625; *Newton v. Consolidated Gas Company*, 258 U. S. 165; *Board of Pub. Util. Commr's. v. N. E. Teleph. Co.*, 271 U. S. 23; *Los Angeles G. & E. Corp. v. Railroad Commission*, 289 U. S. 287.

In *Board of Pub. Util. Commr's. v. N. Y. Teleph. Co.*, *supra*, the court said:

"Past losses cannot be used to enhance the value of the property or to support a claim that rates for the future are confiscatory. * * * Profits of the past cannot be used to sustain confiscatory rates for the future."

In *Los Angeles G. & E. Corp. v. Railroad Commission*, supra, the court said:

"Deficits in the past do not afford a legal basis for invalidating rates, otherwise compensatory, any more than past profits can be used to sustain confiscatory rates for the future."

Furthermore the earnings of 1927, 1928, 1929 and 1930 pertain to a different economic era and furnish no adequate criterion of present requirements. *A. T. & S. F. Ry. Co. v. United States*, 284 U. S. 248, 260, 261.

The Court's holding that the rate was not confiscatory when applied to the years 1931, 1932, 1933 and the year ended March 31, 1934, arrived at by averaging earnings over an eight-year period conflicts with the rules announced in the cases cited. It likewise conflicts with the equally well settled rule that a value of its property *"at the time it is being used for the public."*

Wilcox v. Consolidated Gas Co. 212 U. S. 19:

"There must be a fair return upon the reasonable value of the property at the time it is being used for the public."

Lincoln G. & E. Co. v. Lincoln, 221 U. S. 349:

"That the company is entitled to a fair return upon the value of the property *at the time of the inquiry* is the rule."

Bluefield Waterworks & Imp. Co. v. Pub. Serv. Comm., 262 U. S. 679:

"Rates which are not sufficient to yield a reasonable return on the value of the property used, *at the time it is being used to render the service*, are unjust, unreasonable and confiscatory
* * * "

McCardle v. Indianapolis Water Co., 272 U. S. 400:

"It must be determined whether the rates complained of are yielding and will yield over and above the amounts required to pay taxes and proper operating charges a sum sufficient to constitute just compensation for the use of the property employed to furnish the service, that is, a reasonable rate of return on the value of the property *at the time of the investigation and for a reasonable time in the immediate future.*"

Additional authorities to the same effect could be cited.

Another related rule is that the legislative prophecy of earnings under a prescribed rate must square with experience when the rate is applied. The Court ignores this rule and applies another rule—the rule

which applies only to the *legislative process* of fixing the rate. That the *legislative rule* does not apply to the *judicial process of determining* whether the legislative prophecy is valid is clearly shown by the opinion of Mr. Justice Cardozo when he was on the New York Court of Appeals in *Municipal Gas Co. v. Commission*, 121 N. E. 772. The following quotation is taken from the opinion in that case:

“A statute prescribing rates is one of continuing operation. It is an attempt by the Legislature to predict for future years the charges that will yield a fair return. The *prediction must square with the facts, or be cast aside as worthless.* * * * It must square with them *in one year as in another, at the beginning but equally at the end.* In all such legislation, from the hour of its enactment, there thus inheres the seed of an infirmity which the future may develop. It is the infirmity that always waits upon prophecy; *the coming years must tell whether the prophecy is true or false.* All that we can say at the outset is that the power to regulate exists. The validity of its exercise depends upon the nicety of the adjustment *between forecast and events.* This is as true of a regulation which looks forward a year as of one which looks forward a decade or a century. In either case, with differences only of degree, there is a forecast of the future, which must be justified by results. Into every statute of this kind, we are to read, therefore, *an implied condition.* The condition is that the rates shall remain in force at such times *and at such only* as their enforcement will not work denial of the right to a fair return. When the return falls below that level, the regulation is suspended. * * *

"We turn to the precedents, and they give strength to our conclusion. We find no support in them for the principle, now pressed on us by counsel, that confiscation, if only it is avoided today, may be practiced with impunity tomorrow. On the contrary, through repeated decisions there runs the consistent thought, that, in controversies of this order, *experience is the final test*, that the courts must bide their time, and let the workings of the law decide."

The views which Justice Cardozo expressed in the Municipal Gas Company case were not changed by his later experience on the bench of the Supreme Court of the United States. In *West Ohio Gas Co. v. Pub. Util. Comm.*, (No. 2) 294 U. S. 79, 82, he again said:

"Estimates for tomorrow cannot ignore prices for today. * * * A forecast give us one rate. A survey gives another. To prefer the forecast to the survey is an arbitrary judgment."

These two opinions of Mr. Justice Cardozo clearly and emphatically refute the idea that actual confiscation of property for one to four years may be justified simply because past earnings, when averaged with the deficient earnings, afford a compensatory average return. Manifestly, if the company had suffered deficits during 1927 through 1930, the Court would not be willing to throw these deficits into the calculations for subsequent and better years.

If the earnings of former years are eliminated, then it is obvious that the calculations relied upon

by the Court do not support the prescribed rate when applied to the years 1931-1934.

We now deal with certain additional objections to the correctness of the computations shown in Table III. As above stated, the set-up shown in this table contains a hypothetical addition, on account of so-called temperature adjustments, to the actual revenues of 1933 amounting to \$513,768.97 and \$313,018.50 for the twelve months ended March 31, 1934. After averaging the revenues, and thereby averaging weather conditions over the entire period, the Court clearly erred in making another addition, thereby, again, in effect "averaging" weather conditions for the two periods mentioned—1933 and the twelve months ended March 31, 1934. We assume that the correctness of this contention will be conceded. Averages, if correctly arrived at, are based on actual experience. The very purpose of averaging is to substitute a hypothetical average for an actual experience. Having done this by the process of "averaging," it is manifestly erroneous to then make another hypothetical addition ostensibly for the purpose of again bringing the low return years up to the level of the higher return years.

Again, we respectfully submit that no court has ever sanctioned the addition of hypothetical revenues for the purpose of determining whether a rate is confiscatory as applied to a particular year. To do so "is to prefer prophecy to experience." What a rate-making agency may *legislatively* prophesy in prescribing the rate is one thing; the actual experi-

ence of the utility, proven in a *judicial inquiry*, as to the reasonableness of the rate is quite another.

If these arbitrary additions be eliminated, then the amount available for Federal income tax and return on the cost rate base for the year 1933, instead of being 5.12 per cent as shown by the Court, will be 4.10 per cent; and for the twelve months ended March 31, 1934, instead of being 5.18 per cent as shown by the Court, will be 4.55 per cent.

The foregoing rates of return are based on actual costs as reflected by the Company's books. The criticisms which the Court has leveled at the Company's appraisal in reference to material prices, costs of excavations, going concern value, valuing of gas reserves, taxes during construction, etc., cannot apply to the *book costs* because these represent actual costs which no one has successfully assailed.

The only items to which the Court's criticisms might apply are the undeveloped leaseholds and the Petrolia Field property. We have elsewhere shown that the undeveloped leaseholds are proper items to be included. And it will hereinafter be made to appear that the exclusion of the Petrolia Field property will not change the fact that the Commission's rate is confiscatory.

It is further established by undisputed evidence that the costs as reflected by the Company's books do not include overhead construction costs incurred prior to 1927. And, for other reasons fully explained in the record, the books understate the actual costs of the property. (I. R. 348-52.) Again, the book

costs shown in Table III do not include cash working capital, material, supplies or going concern value. (I. R. 3625.) The total general construction costs capitalized by the Company amounted to \$739,958.75 on December 31, 1933. (I. R. 350.) If these capitalized costs be deducted, and the Commission's allowance for general construction costs in the amount of \$4,528,968.30, as well as its allowance for cash working capital in the amount of \$1,488,369.91 be added, and the book cost of Petrolia Field property in the amount of \$758,619.21 (State's Ex. 4, III R, 2125) be eliminated, the actual cost rate base will be \$54,917,871.13. Accepting the Court's figures for all other items, it appears that the amount then available for Federal income tax and return would have been 4.70 per cent for 1933 and 4.75 per cent for 1934 on this rate base.

Computations appearing in Table III attached to the court's opinion make no allowance whatever for Federal income taxes for the years 1931, 1932, 1933, and 1934. The Supreme Court of the United States has repeatedly recognized the propriety of including Federal income taxes as an expense of operation. *Galveston Elec. Co. v. Galveston*, 258 U. S. 388; *Georgia Ry. & Power Co. v. Railroad Commission*, 262 U. S. 625.

In the second basis employed in Table III the same factors were used as in the first basis except that the commission's rate base, plus capital additions, was used. Upon this basis the court shows a return of 6.01% for 1931, 5.66% for 1932, 5.34% for 1933, and

5.40% for 1934. This rate base does not take into account increases in prices for material and labor. It includes only the additions to property. Manifestly, if the Commission's rate base had been correct as of December 31, 1931, still it should be increased in proportion to the increase in materials and labor prices for the subsequent years. The Commission's rate base purported to be based upon a reproduction cost new estimate. The undisputed evidence shows an increase for prices in steel pipe and dresser couplings as of June 11, 1934, over those adopted by the Commission of \$3,409,626.91 (Co.'s Ex. 39, V. R., 3043-46). But if this increase in prices for pipe and dresser couplings be entirely disregarded and the Commission's rate base adopted, as shown in Table III, which does not include anything for the Petrolia Field property, and all other computations set forth in Table III be adopted, except the arbitrary additions to revenues for 1933 and 1934, the amounts available for Federal income taxes and return are shown to be 4.28% for 1933 and 4.75% for 1934.

The third basis used in Table III is identical with the first basis except that instead of using the Commission's allowance for reserve accruals the court uses the average annual charges against the reserve during the years 1927 through March 31, 1934, in the amount of \$344,871.84. That this figure is not substantial evidence of what is required to provide for depreciation, depletion and amortization is perfectly obvious. The Commission did not adopt this figure and no witness has testified that it would be

adequate. We respectfully submit that the Court can hardly contend that there is substantial evidence in the record to support the use of this figure as being the proper amount for annual reserve accruals.

Here the court abandons the findings of the Commission and substitutes a much lower figure for depreciation reserve accruals. *The substituted amount is 65% below the amount allowed by the Commission.* It amounts to .71% for 1931, .70% for 1932 and .68% for 1933 on the book cost of the property. The State's witness Freese estimated \$848,546.48 for depreciation and admitted that \$94,000.00 additional would be required for depletion on the Texas properties alone. This would make a total of \$942,546.48 which the State's alleged expert estimated would be required for depreciation and depletion on the Texas properties alone. This is \$597,674.64 more than this Court uses in its computation here referred to.

The fallacy of using *average* charges against the reserve from 1927 through March 31, 1934, inclusive, is apparent from Table III itself. The ~~table~~ shows that in 1927 the average book cost of the property was \$29,517,879.08, and that it increased each subsequent year until it reached \$50,399,110.82 in 1933. The Court is apparently assuming that the charges against reserve for depreciation, depletion, removals, replacements and abandonments of property in 1927, 1928 and 1929 are a criterion for determining reserve accruals on the much larger property that existed in 1933. Furthermore, the use of average charges against reserve for past years ignores the

fact that at the date of inquiry the property was a comparatively new one. It had a weighted age of only twelve years (III, R. 1860, 2041-2). More than 60% of all the pipe in the system was installed new during the seven-year period prior to the date of inquiry (V. R., 3081-2). Only 20.45% of the total compressor horse power in service at the date of inquiry had been installed prior to 1932 (V. R., 3175). Obviously charges experienced in the past on the smaller property are no criterion for determining the reserve accrual requirements needed to meet the increasing eventual retirement liability on the larger and newer system. The use of average annual charges for prior years as a criterion for determining reserve accruals on this property ignores the important and indisputable fact that where, as in this instance, there has been a rapid growth, retirements at one point of time will relate for the most part to the smaller preceding plant, while the depreciation reserve account is currently building up to meet the increased eventual retirement liability of the enlarged plant. See *Lindheimer v. Ill. Bell Tel. Co.*, 292 U. S. 115.

Basis No. 4 in Table III is identical with basis No. 2 except that the *average* annual charges against reserve have been used in connection with the Commission's rate rather than the allowance made by the Commission for reserve accruals.

Here again the Court's computation abandons not only the evidence but also the findings of the Commission. It may be clearly, if not necessarily, inferred from the Court's opinion that these two com-

putations—the third and the fourth—are presented as being based upon “substantial evidence.” We respectfully submit that they are not based on any evidence and are in express conflict with the Commission’s findings.

It is apparent from Table III that the court did not and could not rely upon an appraisal submitted by the State for determining the rate base of the entire integrated system. The court was forced to rely upon the book cost and the rate base found by the Commission because the State at the trial did not submit an appraisal of the entire integrated property. The only evidence showing what its alleged expert determined the reproduction cost new of the entire integrated system to be was the appraisal made by the witness Freese as of December 31, 1931, which showed a reproduction cost new at that date of \$53,500,251.39 (III, R., 1797). This appraisal was not introduced in evidence by the State but was used by the company for impeachment purposes. If there be added to this appraisal as of December 31, 1931, the increases in prices for pipe and dresser couplings shown in the company’s Exhibit 39, \$3,409,626.91 (V. R., 3043-7) the rate base as of June 11, 1934, would have been \$56,909,878.30.

Nowhere in Table III does the court rely upon any estimate of reserve accruals put forward by the State. It could not do so because the State’s witness confined his estimate to the Texas properties alone.

It is interesting to note that in Table III the court uses the Commission’s rate base as though it were confirmed by the evidence. In this connection the

court assumes the very point in issue. It assumes that the Commission's rate is supported by substantial evidence but it does not point out any evidence which confirms the Commission's base except insofar as the actual cost of the property may do so. The court points to no reproduction cost new or fair value estimate which supports the Commission's rate base which it uses, and the actual cost is shown on Table III to be considerably in excess of the Commission's rate base for the years 1931, 1932, 1933, and March 31, 1934. How can the court conclude then, that the Commission's rate base is supported by substantial evidence? The only evidence to which it refers shows that the rate base is too low.

As further conclusive evidence that the Commission's rate is not supported by substantial evidence and that the Commission's findings do not support its order, witness the table which we set forth at pages 64 and 66 of our "Reply Brief for Appellant" filed in the Supreme Court of the United States. In that table we have resolved every doubt in favor of the appellants and have pared down operating expenses, rate base, and all other items unsparingly, and it is nevertheless shown that the rate would not yield 6 per cent return which the Commission found was a minimum return. (Reference in the sub-title to "Appellæes' Witness" means the Commission's witness. So, references in the footnotes are to the parties as they stood in the United States Supreme Court).

That table and the accompanying explanatory "notes" are quoted from that brief as follows:

"REVENUES, EXPENSES AND AMOUNTS AVAILABLE FOR RETURN"

Based on 32c Domestic Gate Rate and Operating Expenses as Set Out by Commission
Depreciation and Depletion as Testified to by Appellee's Witness

	Dec. 31, 1931	Dec. 21, 1932	Dec. 31, 1933	Mar. 31, 1934
Amount available for Depreciation, Depletion, Federal Income Tax and Return (Note 1) ---	3,765,160.24	3,978,890.81	3,093,567.60	3,293,167.05
Depreciation and Depletion (Note 2) -----	942,546.08	942,546.08	942,546.08	942,546.08
Amount available for Federal Income and Return (Note 3) -----	2,822,614.16	3,036,344.73	2,151,021.52	2,350,620.97
Federal Income Tax (Note 4) -----	216,627.86	256,841.59	145,744.27	175,769.90
Amount available for Return (Note 5) -----	2,605,986.30	2,779,503.14	2,005,277.25	2,174,851.07
Rate Base No. a (Note 6) -----	48,506,490.31	50,764,182.38	50,566,776.74	50,602,511.77
Rate Base No. b (Note 7) -----	50,252,481.96	50,252,481.96	50,252,481.96	50,252,481.96
Amount available for return (Note 8)				
Base a -----	5.37	5.48	3.97	4.30
Base b -----	5.19	5.53	3.93	4.33

Note 1. Appellant's Ex. 13 (III, R. 2283-2285; also 2297-2303). The revenues are based on the 32c rate and the operating expenses have been adjusted to conform to the Commission's eliminations, averages and adjustments. Management fees have been excluded. Donations allowed by the Commission have been included. Regulatory expenses have been amortized over a ten-year period. Dry hole and canceled and surrendered lease expenses have been amortized as the Commission amortized them.

Note 2. Appellees' estimate for annual reserve accruals. See appellants' main brief, in the Supreme Court of the United States, 163. This figure covers the amount appellees' witness admitted would be required for depreciation and depreciation reserve accruals on the Texas properties only. It is applied here to the integrated operating system because it is the estimate made by appellees at the trial in the District Court. It is less than the Commission's allowance for the whole property. The Commission allowed \$968,066.98 for depreciation and \$15,631.45 for depletion (I. R. 97-99.)

Note 3. Calculation.

Note 4. Federal income taxes calculated at prevailing rates, after deduction of interest payments. Depreciation and depletion have been taken at the rate estimated by appellees' witness. See Note (2).

Note 5. Calculation.

Note 6. Actual book cost as shown at pp. 36-37 of appellant's main Brief in the United States Supreme Court, less actual cost of the Petrolia field property, in the amount of \$758,619.23 (Appellees' Ex. 4, III, R. 2125). This book cost includes general construction cost in the amount of \$739,958.75 as of 12/31/33. All of such costs were not capitalized on the books (I, R. 348-351). The Commission allowed \$4,528,968.30 for construction overheads, being administration and legal expense, engineering and supervision during construction, taxes during construction, interest during construction, and preliminary and organization expense (I, R. 47-52). Cash working capital has been added to the actual book cost in the amount allowed by the Commission, \$1,488,369.91 (I, R. 52).

Note 7. This represents appellants' appraisal of the physical properties, less accrued depreciation, in the amount of \$55,809,205.16 (Ex. 37, V, R. 3037); from which undistributed general costs and general supervision in the total amount of \$8,932,012.77 have been eliminated (Ex. 37, R. R. 3038-3039). There is also excluded appellants' appraisal of the Petrolia field in the amount of \$687,781.13. Collateral construction costs and working capital have been included in the amount allowed by the Commission, being \$6,017,337.16 (I. R., 47-52). Developed leaseholds have been included at actual cost less depletion, as allowed by the Commission, in the amount of \$727,442.54 (I. R. 71-72). Undeveloped leases have been included at actual cost, as included in appellants' appraisal, in the amount of \$893,291.28 (V, R. 3038).

Note 8. Calculations.

The above is not presented on the theory that the jury and trial court were compelled to accept these figures. In every instance there was evidence in the record, more favorable to the verdict, that the jury might have accepted.

From the foregoing it clearly appears that the Commission's order is not supported by any substantial evidence and in face is not supported by the Commission's findings. This is shown to be true by using the Commission's findings on revenues, expenses, depreciation, and rate base.

9.

This Honorable Court erred in failing to hold that appellant had discharged the burden of establishing by "clear and satisfactory evidence" that the rate was confiscatory.

Statement and Argument

We here adopt the statement presented in "Appellee's Brief Showing What Disposition Should Be Made of This Cause Under the Mandate Issued by the Supreme Court of the United States," beginning on page 38 and extending to page 66.

10.

This Court erred in adopting and approving, in effect, the Commission's rate base of \$46,246,617.53, as representing the fair value of appellant's over-all properties.

Statement

We here adopt the statement presented in "Appellee's Brief Showing What Disposition Should Be Made of This Cause Under the Mandate Issued by the Supreme Court of the United States," beginning on page 38 and extending to page 66; as well as the statement heretofore made under Assignments of Error Nos. 1 to 8, inclusive, *ante*, pp. 59-77.

11.

This Honorable Court having approved the findings of the Commission, erred in failing to hold, upon the basis of such findings, that the prescribed rate was shown to be confiscatory.

Statement

See statement under Assignments of Error heretofore made, *ante*, pp. 59-77.

12.

This Honorable Court erred in holding, in effect,

that the Company's undeveloped gas leaseholds, having an actual cash cost of \$893,291.18, were not used and useful in the public service and should be excluded from the rate base.

Statement and Argument

In discussing undeveloped leaseholds the court, at page 10 of its Opinion, says:

"The same is true of the company's claim to the book costs of its undeveloped gas leaseholds aggregating \$893,291.18."

The court here evidently refers to the concluding sentence of the preceding paragraph in its opinion relating to the Petrolia field properties. That sentence reads:

"The question of what property was used and useful was primarily for the Commission to determine, and since it determined the question upon amply sufficient and very substantial evidence, as shown by its findings of fact and evidence, the issues should not have been submitted to the jury." (Our italics.)

Here the Court is inconsistent. The Commission included in its rate base undeveloped leaseholds at actual cost in the amount of \$1,263,871.38 (I, R., 69-72, 99). Therefore, if the court had followed the Commission, it would have allowed the undeveloped leaseholds to remain in the rate base.

The Court cites no authority in support of its conclusion that the undeveloped leases should not be included in the rate base. The most direct authority that we have been able to find is *West Ohio Gas Co. v. Public Service Commission*, 2 Fed. Supp. 792, 798. In that case the Court said:

“The commission held that certain gas leases claimed to be held by the Cities Service Gas Company for gas reserves were in excess of the required reserves, and that they were in fact being held for speculative purposes. The evidence established, and we have found, that the officers and directors of the Cities Service Gas Company, who are men of broad experience in the natural gas business, in the exercise of an honest and we think, sound business judgment, determined that such leases were necessary to afford it an adequate reserve, and that such leases were acquired and are held by it as bona fide reserves, and not for speculation.

“The commission was not empowered to substitute its judgment for that of the officers and directors of the Cities Service Gas Company as to the amount of leases necessary to afford an adequate gas reserve, in the absence of a showing of abuse of discretion by such officers in that regard (citing authorities).”

It seems to be quite generally held that a utility may acquire or construct such surplus property as may be needed in the reasonably near future in the operation of its public service business, and that such property should be included in the rate base. Some of these cases so holding are as follows:

Consolidated Gas Co. v. Newton, 267 F. 231 (260) ;

Colorado Power Co., v. Halderman, 295, F. 178 (187) ;

Southern Bell Tel. & Tel. Co. v. Railroad Com. of S. C., 5 F. (2d) 77 (94) ;

Pacific Telephone & Teleg. Co. v. Whitcomb, 12 F. (2d) 279 (288) ;

Columbus Gas & Fuel Co. v. Columbus, P. U. R. 1927C 639 (653), 17 F. (2d) 630 ;

Denver Union Stockyard Co. v. United States, 57 F. (2d) 735 (746).

It seems obvious that the value of the undeveloped leases held by the Company and included in its appraisal is entirely reasonable, taking into account the magnitude of its business. Natural gas reserves are wasting assets. The depletion of gas fields is a common occurrence, and frequently the depletion occurs in advance of expectation. The result is that a company which serves 300 cities and towns with its supply of gas would indeed be short-sighted and poorly managed if it did not provide in advance against the depletion of its supply.

There is no evidence of the exercise of poor judgment or bad faith in the purchase by the Company's managers of these undeveloped leaseholds. Presumably they acted upon reliable geological surveys and

other scientific information. No fraud or bad faith being charged, it should be presumed that they acted in good faith and in the exercise of proper judgment in the purchase of these leaseholds. In *West Ohio Gas Co. v. Commission* (No. 1), 294 U. S. 63, 72, the Court, speaking through Mr. Justice Cardozo, said:

“Good faith is to be presumed on the part of the managers of a business. *Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 262 U. S. 276, 288, 289. In the absence of a showing of inefficiency or improvidence, a court will not substitute its judgment for theirs as to the measure of a prudent outlay. *Banton v. Belt Line Ry. Corp.* 268 U. S. 413, 421; *Brooklyn Borough Gas Co. v. Prendergast*, 16 F. (2d) 615, 623; *New York & Richmond Gas Co. v. Prendergast*, 10 F. (2d) 167, 181.”

Certainly this presumption should be recognized in a case where it was recognized, as here, by the regulatory board. No burden devolved upon the appellee to offer affirmative evidence in support of the Commission's findings.

13.

This Honorable Court erred in criticising the appellee's method of determining the value of its developed leaseholds, and especially in that portion of its opinion where it approved what it calls the Commission's "more simple and direct method of handling production costs and properties by allowing the full value of the gas at the well head at the current

market price on an annual or current basis which was shown to be a proper method of determining such matters."

Statement and Argument

Here the Court is clearly in error we respectfully submit. The Commission did not employ the well head price method mentioned by the Court. The method to which the Court adverts, involving an allowance of the so-called well-head price as a substitute for the actual appraisal of the Company's reserves, was the method followed by the witness Freese in the District Court; it was not the method approved and adopted by the Commission. Other methods were discussed but the Freese method was not adopted. Instead, the Commission included in its findings a *valuation*, assigned to the developed producing leaseholds and production properties, amounting to \$4,674,285.91. The Commission's findings show that these properties were *used and useful* in the public service, and it was therefore not only proper but *necessary* that they should be included in the appraisal at a fair value. Property that is admittedly used and useful must be appraised. The action of the witness Freese in excluding this *valuation*, and in attempting to substitute therefor an arbitrary and inadequate *formula*, was clearly wrong and was merely a device having the effect of denying the appellee a fair return on the fair value of an important part of its property found by the Commis-

sion itself to be used and useful in the public service and included by the Commission in its rate base.

The witness Freese not only eliminated the production system property but eliminated all operating and depreciation expenses conducted with these properties, and his method lacked \$426,219.60 per annum of providing for actual operating expenses, depreciation, depletion, and a 6 per cent return on the actual cost of these production system properties. The record facts being fully set forth in our original United States Supreme Court brief, filed in this Court, pp. 49-50.

This Freese method ignores the fundamental rule of rate-making which permits the utility to earn a reasonable return on the fair value of the property employed in the public service. Whether a particular rate allows a reasonable return can be determined only after ascertaining the fair value of the property, operating revenues and expenses, and other pertinent factors. This is the only way in which to determine whether the prescribed rate provides a reasonable net return on the fair value of the property. The effect of the Freese method, which this Court apparently has approved, is illustrated, as well as condemned, by the undisputed facts of the record. By using this method Mr. Freese eliminated all of the production system properties, operating expenses and depreciation expenses. He allowed what he called the well head price for the gas produced from the company's own gas reserves; he arbitrarily assumed, contrary to actual fact, that the

company was in the attitude of purchasing its own gas. His method lacked \$426,219.60 per annum of providing enough to cover actual operating expenses, depreciation expense, depletion and a 6 per cent return on the actual cost of the production properties.

Under this method of treating the company as purchasing gas that it is actually producing as an owner, the value of the company's production system properties would vary yearly according to the amount of gas withdrawn from its gas reserve. Thus, in cold weather when more gas is withdrawn, the properties would have a much higher value than in warm periods when little gas is produced, although the properties would remain the same and would, in fact, be worth no more during a cold season than during a warm season. Under this well heard price theory of valuing gas reserves, the company's rates would depend upon the extent to which it used its gas reserves from time to time. During a cold year the use would increase and the rate base would decrease. Consequently, it would be proper to increase the rates. The same theory might be applied to the valuing of pipe lines. With equal logic they might be valued higher during cold years because of a greater use during said years in the transporting of gas.

At the bottom of page 41 of its opinion the Court sets out a table which it asserts represents the "annual expenses in connection with the production of gas" as claimed by the company. The Court then concludes that if these expenses are considered in

relation to the amount of gas produced during the year 1933, it would require an average price in the field of 29.37c per thousand cubic feet of gas. It is apparent that the so-called expenses set out by the court are not in face production expenses. The production system expenses were \$105,554.86 for the year 1933, as shown in the company's Exhibit 8 (III, R., 2215). Canceled and surrendered lease expense set out by the court has nothing to do with the production of gas. It relates to undeveloped leases. What the court actually sets out is not annual expenses in connection with the production of gas, but annual expenses plus depreciation and depletion allowance and return on the fair value of the production system property which consists of leaseholds, gas wells, production system structures, production system equipment, general supervision and undistributed general costs, all of which were appraised by the company in the amount of \$9,141,858.05. (IV, R., 2364)

But the error in the court's reasoning here is a deeper one. As the table of gas sales and purchases set forth on page 30 of the court's opinion amply illustrates, the company purchases most of its gas. Its own gas reserves are largely used to supply peak demands or when the amount of gas available to it from other sources is inadequate to supply the demands of its customers. It is manifestly incorrect, therefore, to measure the value of the company's reserves by the volume of gas produced from them during any one year. The company is a public service corporation. It must meet the demands of its

consumers regardless of the expense involved. In order to meet these demands it must provide a gas supply of its own so that when the independent producers fail to provide sufficient quantities to meet the public demand, the public service will not be interrupted. In the natural gas business peak demands occur infrequently. Moreover, the company cannot anticipate in advance what the peak demand will be. The peak demand depends upon weather conditions which are beyond the control of the company. Thus, the company must build pipe lines which are more than adequate to meet the average demands of the consumers in order that it may meet the peak demand. A certain amount of the capacity of these lines is inevitably idle in periods of off-peak demand but no one could rationally contend that their value should be determined by the extent of their use during the peak demands. The company maintains compressor stations which are used only during a portion of each year. They are necessary to raise the pipe line pressure in periods of peak demand but they are idle in periods of off-peak demand. Certainly the value of these stations cannot be measured by the extent of their use. Their existence and operation is essential to the public service and yet they are used only during a small part of the year. It is unreasonable for a court or commission to contend that a natural gas public utility, upon which rests the responsibility of supplying a public service to thousands of consumers, should be at the mercy of independent gas producers over whom it has no control whatever. Good management dictates that the company protect its public service busi-

ness by acquiring and holding at all times a supply of gas adequate to protect the public service from interruption.

Moreover, as a basis for its computations the Court selected the year in which the company's gas sales were the lowest during any period from 1927 through 1934, inclusive. This is apparent from the table set forth at page 30 of the court's opinion.

We therefore respectfully submit that the Court clearly erred in approving the formula of this witness, the application of which afforded a sum not even sufficient to pay operating expenses of the production properties and leaving the appellee *no* return on their fair value. And in passing it may properly be stated that doubtless this action on the part of the witness explains the refusal of the jury to accept his testimony and his elaborate calculations and so-called "adjustments." The fact that he was unwilling to allow the Company *any* return on its production system properties was enough to completely discredit his testimony before the jury; especially in view of the fact that his testimony on this point was in conflict with the Commission's findings and in conflict with his own appraisal previously made and offered in evidence for purposes of impeachment.

14.

This Honorable Court erred in holding that it was not necessary to include in the rate base a fair ap-

praisal of the production system properties but that it was sufficient to adopt and apply the arbitrary formula devised by the witness Freese, which formula in actual application lacked \$426,219.60 of providing an amount sufficient to cover operating and depreciation charges and a six per cent return on the actual cost of these properties.

Statement and Argument

Here again, as we respectfully submit, the Court has departed from the Commission's own findings. The Commission included the production system properties in its rate base at what it found to be their fair value. It did not adopt the witness Freese's formula. The application of this formula against the appellee amounts to a denial of due process of law. *West v. Chesapeake & Potomac Telephone Co.*, 295 U. S. 662, 678. No more reason can be assigned for a refusal to *value* this part of appellee's property than for a refusal to value its pipe lines or any other part of its property used and useful. Fiction may not be substituted for facts. The property has a value easily arrived at, and that value must be included in the rate base. A formula may not be substituted for an appraisal.

15.

This Honorable Court erred in holding, in effect, that the properties purchased by appellee from Meri-

dian Gas Company in 1932 should be eliminated from the rate base.

16.

This Honorable Court erred in holding, in effect, that the properties purchased by appellee from Southern Oil and Production Company should be eliminated from the rate base.

17.

This Honorable Court erred in holding that the properties acquired by appellee from Meridian Gas Company and Southern Oil and Production Company were not shown to be used and useful in the rendering of public service, this holding being in conflict with the Commission's findings wherein it found, in effect, that said properties were used and useful.

Statement and Argument

We respectfully submit that this Court is clearly in error stating that there is no evidence of the usefulness of these properties. The Court recognizes that they were "primarily production" properties, and the undisputed evidence shows that the company's gas reserves are used and useful and necessary in its public service operations (R. III, 2044).

No witness, and not even the Commission, ques-

tioned the usefulness of the so-called Meridian properties. *In fact, the Commission itself treated them as being used and useful.* The Commission in its opinion made an allowance of \$70,227.30 "for providing a return on the Meridian properties which were brought into the system since the date of the valuation submitted to us (Commission opinion, p. 77). The Commission also refers to the fact that the Meridian properties were purchased "on January 1, 1932," and that "neither the company witnesses nor the witness Freese submitted an appraisal of these production properties" (Opinion, p. 79).

The inclusion of the Meridian properties in the Commission's reckoning must be taken as evidence that they were *used and useful*; how they should be valued being an entirely different matter. On page 10 of its opinion this Court said:

"The question of what property was used and useful was primarily for the Commission to determine."

Applying this rule, the Meridian and Southern Oil and Production Company properties must be included in the rate base because the Commission determined that they were used and useful.

Referring to the Southern Oil and Production Company properties, the Commission at page 79 of its opinion said:

"The Southern Oil and Production properties

were acquired on October 1, 1932, at a book cost of \$766,600.11 *for the public service properties*. Inasmuch as this latter property was a part of the Lone Star Gas Company properties for the last three months of 1932, there would be an addition to the average rate base of $\frac{1}{4}$ of \$766,600.11 or \$191,650.03.”

From this it is apparent that the Commission regarded these properties as being used and useful. It refers to them as “public service properties” and includes them in the rate base for the year 1932 at $\frac{1}{4}$ of their actual cost, instead of their entire cost, this being done because they were not purchased by the company until October 1, 1932, and were therefore actually used by the company after being purchased for only one-fourth of the year. Here, as in respect to other matters previously discussed, we invoke the Commission’s findings. The appellee was not required to offer evidence in *support* of these findings.

This Honorable Court refers to the fact that the appraisals submitted by the Commission and by the Company did not include these properties (Opinion p. 31). The Commission’s opinion discloses the reason; the appraisals were of date December 31, 1931, and these properties were not acquired until 1932.*

*Through error which we are unable to explain, it was erroneously stated on pages 28 and 29 of our original Motion for Rehearing (reference being to printed copy) that the company’s appraisal was of January 1, 1931. That, of course, is wrong. The stated date should have been December 31, 1931, as expressly appears from the Commission’s opinion. This mistake, however, (carried by us into the printed copy because appearing in the typewritten copy) in no way affects the correctness of the point made in the same connection. The Commission’s opinion shows the properties were not included in the December 31, 1931 appraisals because they were not acquired until 1932.

The Court's statement in respect to these properties that there is not sufficient evidence in the record to warrant their consideration for any purpose (Opinion, p. 31) might apply with equal force to all of the company's property because during the trial neither the company nor the State selected segments of the company's pipe line system and other properties with the view of offering evidence to show that this and that specific part or segment was essential to the public service operations.

18.

This Honorable Court erred in holding that the prices for materials used by the appellee in its appraisal were not quoted priced less all available discounts.

19.

This Honorable Court erred in finding that the quoted prices for materials used by appellee were far above the prices obtained by appellee in actual purchases.

Statement and Argument

The Court states that the company's witnesses "*claimed* to have obtained from leading manufacturers quotations of the prevailing prices, with all applicable discounts applied" (Opinion, p. 38). The undisputed evidence shows that the company did ob-

tain and apply the lowest prices quoted by any manufacturer for large-lot purchases, after giving effect to all available discounts (II, R., 842-3). The company's witness Holloway, district sales manager for Jones & Laughlin Steel Corporation, one of the major steel corporations in the United States, examined the prices used by the company and stated that they were rock-bottom prices to which no further discounts would apply (III, R., 1978-9).

In view of the foregoing testimony the further statement of the Court that "the company, in its estimate, did not take full advantage of all discounts available to it" (Opinion, p. 38) is not only unsupported by evidence but contrary to the undisputed evidence.

The Court makes the further statement that "the Commission's witness Freese testified that his investigation showed that large-lot purchases could be obtained at prices 10 to 15% or more below quoted prices" (Opinion, p. 38). Mr. Freese did so testify, but on cross-examination he was unable to substantiate this statement with the citation of facts. Among other things, he testified:

"A. No, I don't know of any carload or less than carload purchases that have been made at less than the quoted price." (III, R. 1763-64)

The Court further states that "a good example of the results of the use of 'quoted' prices rather than actual prices being currently paid (here actual prices are available) is the fact that the company

used in its appraisal a 'quoted' price of \$3.00 per foot on more than a mile of 24" pipe which was actually purchased in 1933, for approximately \$2.00 per foot." (Opinion, p. 38) This statement is probably based on Freese's testimony appearing in Volume III, p. 1746 of the Record. The Court's statement is misleading because it does not include all the material facts. The record conclusively shows that this 24-inch pipe which the Court uses as "a good example" was purchased in 1933. It consisted of only 6,300 feet (II, R., 902). The pipe was purchased at a distress sale (II, R., 905-6). It was not in standard condition when purchased and it was necessary for the company to recondition it (III, R., 2045-63.) This pipe represented an odd lot which was left in the yards of the National Tube Company (II, R., 906).

Owing to the fact that the pipe was purchased in March, 1933, it was not included in the company's appraisal, Exhibit 28, which it introduced in the District Court trial (II, R. 902, 905).

The foregoing is the only instance appearing in the entire record where the company's purchases were below the quoted prices. It is obvious that this distress, second-hand and bad condition pipe is not a fair example of what the company would have to pay if it were to reproduce its pipe line system.

20.

This Honorable Court erred in holding that the

excavation cost claimed by the appellee was too high and that the Commission's findings concerning these items were sustained by the evidence.

Statement and Argument

In discussing this item of the rate base the Court appears to have given great weight to the testimony of the witness Dobson. The Court states that Dobson was apparently the best qualified of all the witnesses. We respectfully submit that this was a question to be determined by the jury, inasmuch as it is clearly related to the *credibility* of the witnesses. Mr. Dobson testified that he had never done any excavation in connection with cross country natural gas pipe line construction. Mr. Dobson further testified that his estimate for excavation cost did not include any provision for the hauling in of dirt for the bedding of pipe and rock (Vol. 4, p. 2794). He also testified that his estimate made provision for only so much bell hole excavation as could be handled by two (2) men back of the ditching machine. (Or. Rec., Vol. 4, p. 2795)

It should also be noted that the estimate made by the witness Dobson in this case was considerably higher than the estimate made by him when he testified before the Railroad Commission in this case (Vol. 4, p. 2792). It might be further noted that the estimates made by the witness Dobson were made upon an investigation and inspection of the Lone Star Gas System made by him and that the total time

consumed on such inspection tour was three (3) days (Or. Rec., Vol. 4, p. 2770).

In connection with the statement of the Court to the effect that—

“ . . . these witnesses would have been glad to have done the work at the prices testified to by them,”

we direct attention to the testimony of the witness Dobson to the effect that he would not want to say that he was in a position to undertake a job of the kind in question and that he would probably have to call in somebody to help handle such a job (Or. Rec., Vol. 4, p. 2789).

It is also worth while to note that in answer to a question propounded by the court, the witness Dobson testified that he would be willing to give away his profit in order to obtain a contract of the kind in question (Or. Rec., Vol. 4, pp. 2799-2800). A company actually undertaking the construction of a pipe line similar to the one involved in this suit would no doubt find it impossible to find a contractor who would be willing to give away his profit in order to obtain a contract. The jury manifestly had the right to disregard the testimony of a witness who admitted on the witness stand that he would give away his profit in order to obtain the contract.

The Court also refers to the testimony of the Commission's witness Robinson in regard to excavation

cost. The witness Robinson testified that the only experience he had ever had in connection with excavation on a natural gas pipe line construction job was on "*one small job about fourteen years ago*" (Vol. 3, p. 1616). The witness Robinson further testified that he was not familiar with natural gas pipe line construction from his own experience but that the only thing he knew about natural gas pipe line construction work was what he had heard contractors say and what he had read (Vol. 3, p. 1622). The estimate made by the witness Robinson in this case was considerably higher than the estimate made by him when he testified before the Railroad Commission in this case (Vol. 3, p. 1619). Mr. Robinson testified that his estimates were made from information obtained by him on a tour of the Lone Star Gas System. On cross examination Mr. Robinson admitted that he only spent two (2) days in going over the Lone Star Gas System and that he covered some 600 miles in those two days. He further admitted that most of his observations were made from the seat of an automobile Vol. 3, p. 1624).

The other witness used by the Commission on excavation cost and whose testimony is referred to by the Court was the witness Freese. In connection with the estimates of the excavation cost made by the witness Freese, it should be noticed that Mr. Freese admitted that he had had no experience in the laying of a natural gas pipe line (Vol. 3, p. 1762), that his estimates did not represent his own independent judgment based upon experience (Vol. 3, pp. 1760-

1762), but that his estimates were based entirely upon information furnished by contractors (Vol. 3, pp. 1771-1772). The witness could not give a breakdown or analysis of the estimates made by him (Vol. 3, pp. 1769-170).

In contrast to the foregoing evidence submitted by the Commission, the company produced the testimony of the witness Biddison who made the company's estimates for excavation cost based upon the actual experience of the company and on his own personal experience acquired in the actual construction of natural gas lines over a large period of time (Vol. 2, pp. 779, et seq.). Mr. Biddison went into detail as regards his estimates and gave a complete break-down and analysis of the estimates made by him (Vol. 2, pp. 779, et seq.).

What should be included on account of excavation cost was under the evidence an issue that could be settled only by considering *credibility* of witnesses. We respectfully submit that the jury clearly had the right to accept on this issue the testimony of the company's witness.

21.

This Honorable Court erred in holding that the Petrolia field property should be excluded from the rate base.

Statement and Argument

At pages 28 and 29 the Court refers to the fact that the Commission excluded the Petrolia field property from its rate base. The Court then concludes that "the company in no way refuted in the trial court these findings by the Commission." Here the Court is in error. Upon the trial in the District Court the witness Hulcy testified that all the Petrolia field property was used and useful in the public service (I, R., 318). The actual cash cost of this property at December 31, 1931, was: (I, R. 316-317)

Gas Rights	\$347,922.91
Gas Wells	137,689.06
Pipe Lines	190,205.73
Regulating and Measuring Stations	6,503.99
Buildings	5,459.44
Total	<hr/> \$687,781.13

It is apparent from the Commission's findings that the Petrolia field property was actually used in the company's public service operations. The opinion shows that in 1931, 379,984 M. cubic feet of gas were produced from the field. The Commission actually allowed the well head price for this amount of gas and included in its operating expenses \$16,187.32 for the year 1931. The Commission also included "the full salvage value of all the equipment

in the Petrolia field as part of working capital." It is apparent that the company cannot abandon fields simply because the cost of production increases as the field becomes depleted. If the Petrolia field were abandoned, a charge against the depreciation reserve would have to be made in the amount at least of the actual cost of the property. Moreover, it is apparent that the property in the field would have at least a salvable value as material and supplies or would have a value as a replacement in other fields or locations.

The question then under the Commission's findings is not whether the property should be included in the rate base but rather at what value it should be included. And in going further and in holding that *nothing* should be included in the rate base on account of this Petrolia property this Honorable Court, as we respectfully submit, clearly erred.

22.

This Honorable Court erred in the following portion of its opinion, appearing on page 27 thereof:

"Under this instruction the jury was manifestly permitted to either consider or not consider the findings of fact by the Commission, notwithstanding the statutes and decisions attribute to them a high degree of verity, and require that they be regarded as presumptively valid unless shown by clear and satisfactory evidence to be unreasonable or invalid; and the jury was manifestly permitted, upon substan-

tially the same evidence as was before the Commission, to substitute its own findings for those of the Commission."

And in this connection, the Court erred in holding that the District Court's charge permitted the jury, upon substantially the same evidence as was before the Commission, to substitute its own findings for those of the Commission.

Statement and Argument

This is error because the trial court's charge followed the statute literally and instructed the jury that the burden was on the appellee to show by "clear and satisfactory evidence" that the prescribed rate was "unreasonable or unjust as to it" (I, R. 194); and in the same connection, imposed an undue burden on appellee by telling the jury that the rate could not be unjust and unreasonable unless it was so low that it failed to provide a fair return on the fair value of appellee's properties. In other words, on the issue as to whether the rate was unjust or unreasonable the court required the appellee to establish *confiscation* by clear and satisfactory evidence; thus committing a clear error against the appellee. *H. & T. C. R. Co. v. Railroad Commission*, 90 Texas 340, 354.

Under the charge, the jury was permitted to overturn the Commission's order only upon clear and

satisfactory evidence. That is all the statute requires.

23.

This Honorable Court erred in the following portion of its opinion:

"It is therefore clear that the Commission has included in its findings of fair value at December 31, 1931, of Production Properties approximately a million dollars (\$1,073,325.65) more than a strict interpretation of the law and evidence in the case would require." (P. 42.)

Statement and Argument

We respectfully submit that the evidence in the record supports the findings of the Commission in including the production system properties that were included. These matters have heretofore been covered in detail in respect to each item criticised by the Court.

Furthermore, the Commission findings, being presumptively correct, may not correctly be overturned upon a "strict interpretation of the law and evidence."

24.

This Honorable Court erred in the following portion of its opinion:

"The facts above detailed fully justify the con-

clusion that the Commission's rate base represents even more than the fair value of the Gas Company's property used in the public service; that the Commission has made liberal allowances for every character of operating expense, including a rate of depreciation sufficient to recapture the Gas Company's entire original investment; and that the Gas Company has been and will be in the future afforded a fair rate of return, which does not approach even the border line of confiscation. * * * ." (p. 46)

Statement and Argument

We have heretofore covered specifically and in detail the Court's holding in respect to the Commission's including in the rate base properties that should not have been included.

25.

This Honorable Court erred in approving and adopting, in effect, the Commission's allowance for depreciation.

Statement and Argument

We here adopt without restatement the argument presented in our brief entitled "Appellee's Brief Showing What Disposition Should Be Made of This Cause Under the Mandate Issued by the Supreme

Court of the United States to This Court," pp. 41, 49, inclusive.

26.

This Honorable Court erred in holding that a case like this involving a rate order properly may not be submitted to a jury "in any form," (p. 16) and in further stating in the same connection that there is "no case reviewing the administrative action of the Commission where final determination was predicated upon a jury finding."

Statement and Argument

For a discussion of this assignment we refer to our argument, separately filed, entitled "Argument Discussing Article 6059, R. S. 1925, and the Scope of Judicial Review of Rate Orders of the Railroad Commission."

27.

This Honorable Court erred in holding in effect that this case was "submitted on a general charge and a special issue, which method has been uniformly condemned in our practice." (p. 16.)

Statement and Argument

The State did not assign error to the District Court's charge on the ground that it was general.

The only complaint made was in reference to the District Court's definition of the term "used and useful." There is no assignment of error raising the issue to which the Court here adverts. In the Laredo case the State vigorously defended a similar charge. See the argument under the State's Counter Proposition No. 4, pages 50-57, in its original brief filed in this Court.

—28.

This Honorable Court erred in finding and holding that the cost actually incurred by the Company for "preliminary and organization expense" was less than \$232,000.00.

Argument

We respectfully submit that this figure is not supported by the evidence. The undisputed evidence shows that the Company did not capitalize all of such costs.

29.

This Honorable Court erred in holding that appellee was not entitled to any allowance in the rate base on account of going concern value.

Argument.

In discussing this subject the Court, on page 36 of its opinion, refers to the testimony of the witness

Freeze and especially his testimony to the effect that he "had appraised the Company's properties at their full value as a going concern in full business operations." Mr. Freeze did not testify at all as to the "going concern value" of the overall integrated properties except before the Commission. He gave no testimony on this subject before the reviewing court. The same applies to his testimony in respect to "reproduction cost new basis" and the other items referred to by the Court on page 36 as being covered by his testimony.

30.

This Honorable Court erred in adopting the Commission's allowance for interest during construction.

31.

This Honorable Court erred in approving and adopting the Commission's allowance for taxes during construction.

32.

This Honorable Court erred in holding "the items of 'General Supervision Allocated' and 'Undistributed General costs' are speculative, visionary, imaginary, and are purely hypothetical expenses of financing the reproduction of a business, which finds no support whatever in the history or experience of the appellee Gas Company, and do not constitute clear

and satisfactory evidence of such expenses or values." (Opinion, 41.)

33.

This Honorable Court erred in holding that the highest price paid for gas in the field was 15c per MCF to the parent corporation Lone Star Gas Corporation.

Argument

We respectfully submit that there is no evidence in the record of any purchase of gas by the appellee from the parent corporation. There is no evidence that the parent corporation is engaged in the production of gas anywhere.

34.

This Honorable Court erred in basing its decision that the Commission's order was valid on the facts and calculations shown in Table I attached to the Court's opinion for the reason that the said table adopts and presents a rate base less than the fair value of the Company's public service properties as shown by the uncontradicted evidence introduced on the trial in the District Court, and because said table adopts an allowance for accruals to reserves for depreciation, depletion and amortization shown by the evidence to be wholly inadequate.

Argument

These tables are further erroneous because they give no effect to any of the evidence introduced by the Company and give conclusive effect to evidence submitted by the witnesses of the Commission even where such evidence is in conflict with the Commission's findings.

35.

This Honorable Court erred in holding that 6 per cent was a fair rate of return on appellee's public service properties.

Argument

We adopt here the discussion presented in the original Motion for Rehearing, pp. 33-34.

In connection with assignments of error 37 to 40, inclusive, presented in the original Motion for Rehearing, pp. 46-47, we respectfully submit that the accounting exhibits there referred to were clearly admissible. The facts shown in these accounting exhibits could not be proven in any other way. There is no way to show the operating revenues and expenses other than by accounting exhibits. The same applies to the depreciation exhibits. A denial of the right to introduce the evidence in that form is in effect a denial of the right to introduce the evidence

at all and amounts, in effect, to a denial of procedural due process.

It is now submitted that in making each of the rulings complained of in this motion and in sustaining the rate order of the Railroad Commission as being non-confiscatory, as against the appellee's challenge of its validity, grounded upon the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, this Honorable Court has denied to the appellee due process of law and deprived it of its property and of the value of the use of its property without due process of law, in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. It is further submitted that the enforcement of the rate order against the appellee, after it has obtained only such limited judicial review of the order and judicial determination of the properly tendered issue of confiscation as has been outlined by this Court, will deny the appellee due process of law in violation of said Fourteenth Amendment to the Constitution of the United States.

Six copies of the original Motion and of this Supplemental Motion have been delivered to Honorable Gerald C. Mann, Attorney General of Texas, and one copy of each has been delivered to Honorable Alfred M. Scott, who formerly had charge of this case as Assistant Attorney General during the administration of Honorable William McCraw.

Appellee respectfully submits this Supplemental

Motion and asks that it be granted the relief prayed for in the original Motion for Rehearing.

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EXHIBIT "D"

**ORDER MADE JUNE 7, 1939, OVERRULING
ORIGINAL AND SUPPLEMENTAL
MOTIONS OF APPELLEE FOR REHEARING**

**MOTIONS NOS. 9152 & 9159
CAUSE NO. 8238**

STATE OF TEXAS ET AL,

V.

LONE STAR GAS COMPANY

**Appeal From District Court of Travis County.
Order Overruling Motions for Rehearing.**

"The motion for rehearing filed herein by the appellee, Lone Star Gas Company, as well as the supplemental motion for rehearing filed herein by said appellee (the latter having been filed on May 15, 1939, under permission previously granted by this Court) having been duly considered, the said motions, and each of them, are hereby overruled on this the 7th day of June, 1939."

EXHIBIT "E"

Concurring Opinion.

PER CURIAM.

We deem advisable further comment, as brief as the subject will admit, upon the issues reiterated in the very able printed argument in support of appellee's motion for rehearing.

Two main contentions are urged in the argument.

1. It is contended that since R.C.S. Art. 6059 provides for judicial review to determine whether rate orders of the Commission are unreasonable and unjust to the complaining party, and since the trial therein provided is the same as in other civil cases, our decision upholding the Commission order on the ground that it is supported other than by conclusive evidence does violence to this article under which the proceeding was brought.

(38) Manifestly, this question, involving as it does, only the proper construction of a state statute, is one solely for the state courts, and contains no element which would confer jurisdiction upon the Federal courts.

(39) As pointed out in Justice's Blair's opinion, the proper construction of this article, this prototype Art. 6453, and similar statutes of this state providing for this character of judicial review of administra-

tive orders, has been frequently before our courts, and it is now the established law of this jurisdiction that the factual review of such orders extends only to the question whether they have substantial support in the evidence. In other words, while the trial is de novo, the issues are substantially the same as those in certiorari proceedings.

(40) Moreover, if need there were for further adjudication, the question was foreclosed in so far as this case in this court is concerned by our Supreme Court's refusal of an application for writ of error from our former judgment in this case. That decision rendered our judgment final and immune from attack, save only as regards the issue of the asserted denial of due process under the Federal Constitution. After that decision, only federal questions were left open for review, of which the proper construction of the Texas statute was not one.

2. It is contended that our present decision, in so far as it renders judgment upholding the order as against the verdict of the jury and judgment thereon of the trial court, is in conflict with the *Beno Avon* case, *Ohio Valley Water Co. v. Ben Avon*, 253 U. S. 287, 40 S. Ct. 527, 64 L. Ed. 908, and *Stockyards* decision, *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 56 S. Ct. 720, 80 L. Ed 1033, of the Federal Supreme Court and the decision of that court in this case.

This court had under consideration the opinion of the Federal Supreme Court in this case for several

months, aided by able and exhaustive briefs of the respective parties. Determination of the exact basis upon which that opinion was grounded presented a question of no little difficulty. Its final resolution to the effect that the Federal decision was based upon the fact that our former judgment was erroneous in that it applied an untenable theory, was impelled by several considerations which we will briefly consider.

The Laredo case, *United Gas Public Service Co. v. State*, Tex. Civ. App., 89 S. W. (2d) 1094, affirmed, Id., 303 U. S. 123, 625, 58 S. Ct. 483, 82 L. Ed. 702, and this case were before this court at the same time, each involving the basic question of the extent of factual review of the Commission's order, as well as other assigned errors assailing the validity of the trial court's judgment. In each case our decision was rested upon the holding that the Commission's order was supported by that degree of probative evidence which rendered it immune from factual attack in the courts. Other assigned errors in each case we declined to consider on the expressed ground that this holding rendered them innocuous. To have applied the rule for which appellee contends—that it was entitled to an independent factual review and jury finding on all issues as to which the evidence raised any substantial dispute—would have required this court, as an imposed duty, to consider the other assigned errors, the result of which would have been a probable remand in the Laredo case and a certain remand in this case. Necessarily implicit in the Federal decision in the Laredo case is the approval of

the ground upon which this court upheld the trial court's judgment. This is rendered more certain by the dissenting opinion of Mr. Justice McReynolds and Mr. Justice Butler, which is expressly predicated upon adherence to the Ben Avon rule and the assertion that the independent judicial review required by that rule was shown to have been denied by this court. Manifestly, if the character of review for which appellee contends were required, then the Federal Supreme Court has denied to the utility in the Laredo case the right to have reviewed in this court important questions affecting the validity of the trial court's judgment expressly made reviewable in this court by the laws and decisions of this state. If appellee's version of the basis of the Federal Supreme Court's decision in this case were correct, that decision would be in irreconcilable conflict with the decision in the Laredo case, decided by the same court only three months prior to the decision in this case.

Another difficulty in adopting appellee's construction of the Federal Supreme Court's decision in this case lies in the fact that Mr. Justice Stone, who participated in the decision, pointedly expressed the contrary view to appellee's contention in concurring in the Stockyards decision. The Ben Avon decision was handed down in 1920. Mr. Justice McReynolds wrote the opinion of the court, and a vigorous dissenting opinion was filed by Mr. Justice Brandeis, which was concurred in by Mr. Justice Holmes and Mr. Justice Clarke on the point here at issue. Sixteen years later came the Stockyards decision. That

case concerned an order of the Secretary of Agriculture, under the Packers and Stockyards Act of 1921, 7 U. S. C. A. § 181 et seq., reducing rates charged by St. Joseph Stockyards Company, which the Secretary held to be unreasonably high. The order was upheld by both the Federal trial and Supreme Courts. The question of independent judicial factual review was not necessarily involved but was discussed in the majority opinion by the Chief Justice. Mr. Justice Roberts merely "concurred in the result." A very able and exhaustive opinion was filed by Mr. Justice Brandeis, who while concurring also in the result, again vigorously dissented from the views upon the point at issue expressed by the Chief Justice. Mr. Justice Cardozo and Mr. Justice Stone concurred in the views of Mr. Justice Brandeis. We have no evidence of Mr. Justice Stone having changed his views upon this subject. If such were the case, it is hardly probable that he would have omitted to make note of the fact in the instant case, if, as contended by appellee, the decision is grounded upon the holding in the Ben Avon and the dictum in the Stockyards cases.

The latest expression of the Federal Supreme Court upon this question which has come to our knowledge is in the recent case of *Rochester Telephone Corporation v. U. S.*, 59 S. Ct. 754, 761, 83 L. Ed., opinion by Mr. Justice Frankfurter. After discussing the subject of factual judicial review of orders of the Interstate Commerce Commission, the opinion reads:

"From these general considerations the Court evolved two specific doctrines limiting judicial review of orders of the Interstate Commerce Commission. One is the primary jurisdiction doctrine, firmly established in *Texas & Pacific Ry v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075. Thereby matters which call for technical knowledge pertaining to transportation must first be passed upon by the Interstate Commerce Commission before a court can be invoked. The other is the doctrine of administrative finality. Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basis prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable. *Interstate Commerce Commission v. Illinois Central R. R.*, 215 U. S. 452, 470, 30 S. Ct. 155, 160, 51, L. Ed. 280; *Interstate Commerce Commission v. Union Pacific R. R.*, 222 U. S. 541, 32 S. Ct. 108, 56 L. Ed. 308."

The order there under review was that of Communications Commission holding that the Rochester Corporation came under its *jurisdiction*, which presented the factual issue in the case. The opinion concludes:

"The record amply justified the Communications Commission in making such findings. Investing the Commission with the duty of ascertaining 'control' of one company by another, Congress did not imply artificial tests of control. This is an issue of fact to be determined by the

special circumstances of each case. So long as there is warrant in the record for the judgment of the expert body it must stand. The suggestion that the refusal to regard the New York ownership of only one-third of the common stock of the Rochester as conclusive of the former's lack of control of the latter should invalidate the Commission's finding, disregards actualities in such intercorporate relations. *Having found that the record permitted the Commission to draw the conclusion that it did, a court travels beyond the province to express concurrence therewith as an original question.* 'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.' *Mississippi Valley Barge Line Co. v. United States*, 292 U. S. 282, 286, 287, 54 S. Ct. 692, 693, 694, 78 L. Ed. 1260; *Swayne & Hoyt, Ltd., v. United States*, 300 U. S. 297, 303 et seq. 57 S. Ct. 478, 480, 81 L. Ed. 659." (Emphasis supplied)

It is to be noted that Mr. Justice McReynolds and Mr. Justice Butler concurred only in the result.

The Supreme Court of Wisconsin had under consideration in 1937 the question whether independent judicial factual review was essential to due process under the Federal Constitution in appeals from state administrative boards as regards the facts essential to the jurisdiction of the administrative board. Such independent factual review had been held essential in appeals from orders of Federal agencies in *Crowell v. Benson*, 285 U. S. 22, 52 S. Ct. 285, 76 L. Ed. 598.

The Wisconsin case was an appeal from an award

of the Industrial Commission of that state and presented the question whether an independent judicial review of the *jurisdiction* fact question—whether the jury arose in the course of the employment of the employee—was essential to satisfy due process. The opinion by Justice Wickham is a clear, logical, and convincing presentation of the issue, and evidences a thorough familiarity with the subject and with the judicial literature and adjudications thereon. The conclusion was reached that the *Crowell* case is limited in its application to review of orders of Federal agencies and concerns the distribution of Federal governmental powers under the Federal Constitution; and that it has no relation to distribution of powers under state constitutions. Consequently where, under the constitution, laws, and decisions of a state, factual determinations, whether or not they are *jurisdictional*, are committed to an administrative agency under proper safeguards, independent factual judicial review is not essential to due process. The specific holdings on this subject are thus expressed:

“It is our conclusion: (a) That the Compensation Act provides with respect to jurisdictional facts for a review of the same character and extent as that afforded by certiorari; (b) that this review satisfies the requirements of due process and avoids constitutional objections grounded upon the delegation of judicial power to a commission; (c) that these conclusions are not foreclosed by the doctrine of the *Crowell case*; and (d) that this has been consistently held by this court since the enactment of the

compensation act." *General Accident F. & L. Corp. v. Indus. Com.*, 223 Wis. 635, 271 N. W. 385, 392.

In an able address upon the "Power of the courts to set aside Administrative Orders," delivered before a conference held in March, 1938, at Cincinnati under auspices of the Ohio Bar Association, Chief Justice Rosenberry, who participated in the Wisconsin decision, made the following interesting comment thereon:

"The court was called upon to review the whole matter recently (1937) and after giving full consideration to *Crowell v. Benson*, held that the compensation act provides with respect to jurisdictional facts for a review of the same character and extent as that afforded by certiorari; that such a review satisfied the requirements of due process and that this determination is consistent with the holding in *Crowell v. Benson*. By some it is thought the court unduly limited itself with respect to its right of review as to jurisdictional facts; that instead of holding as it did if there was any evidence, however slight, which sustained the finding, it should have held that it would inquire upon the whole evidence whether the minds of reasonable men could have come to the conclusion reached by the administrative agency.

"Although the precise question has not been discussed by the Supreme Court of the United States so far as I am able to discover, prior cases indicate that this determination will be upheld. In 1932, upon the authority of two prior cases,

the decision in *Helfrick v. Dahlstrom M. D. Co.*, 256 N. Y. 199, 176 N. E. 141, (1931), was affirmed by the Supreme Court of the United States. *Dahlstrom Metallic Door Co. v. Industrial Board*, 284 U. S. 594, 52 S. Ct. 202. That was just shortly before *Crowell v. Benson*. The Act under consideration in that case made the findings of the administrative agency conclusive. The Court of Appeals of New York upheld the statute on the authority of *Interstate Commerce Commission v. Union Pacific R. R. Co.* (1912), 222 U. S. 541, 32 S. Ct. 108, 56 L. Ed. 308, and other cases. It held that rate-making was a legislative matter while the determination of compensation was a judicial matter and for that reason the findings of the industrial board could be made conclusive. I had supposed the law was the other way—that a finding of fact by the legislature was given the greater weight. I have always supposed the rule was the other way, that if you had a legislative determination of fact, that that was conclusive, but apparently the Court of Appeals thought differently. It is worthy of note that the Court of Appeals in commenting upon the distinction between rate cases and other cases involving administrative determinations of jurisdictional facts said:

“‘So many are the complications in determining the question of fair return that necessity, not theory, has moved the courts to this conclusion.’

“‘This is the best justification for the distinction between constitutional and jurisdictional facts and other facts upon which liability must rest that I have found in a court decision. Wheth-

er necessity is a satisfactory basis for the distinction, I leave to you."

Likewise of interest, we think, is Chief Justice Rosenberry's following comment upon the Ben Avon decision, especially in view of the holding of the Wisconsin case and the Chief Justice's above comment thereon:

"It is difficult to understand why such great dignity should be assigned to constitutional or jurisdictional facts in the field of administrative law when they are not accorded equal dignity in other fields, as for instance, in the field of taxation or the taking of private property by condemnation.

" * * * Value may be found by a taxing officer and in a proceeding before a tax board of review if the board of review confirms the assessment it becomes conclusive if sufficient evidence is adduced before the board to sustain the assessor's valuation. On the other hand the finding of a rate-making agency which proceeds in conformity with due process requirements is not accorded finality. It is submitted that the determination of fact, that is, value, is no more 'jurisdictional' in one case than in the other. If the assessor's valuation is in excess of the true value of the property assessed and the taxpayer is compelled to pay a tax upon the excess, his property is confiscated just as much as the property of a utility is confiscated if it is taken by way of an order fixing rates based on a value lower than its reasonable value. The ultimate consequences may be very much more important in one case than in the other but it seems to me that the legal

principles which underlie the two are exactly the same.

“The Act under consideration in *Crowell v. Benson* did not provide that all the evidence should be offered in the proceeding before the deputy commission. The sweeping language of the decision leaves no doubt that as to the so-called constitutional or jurisdictional facts the person against whom liability is assessed is entitled to a trial de novo in a court in all cases.”

The question of the proper extent of judicial review of administrative orders has had in recent years the wildest possible consideration by courts, law writers, and law organizations; and the literature thereon is voluminous. While there is a wide divergence of view as to the necessity and propriety of administrative agencies in many fields which they have invaded in recent years, it is quite generally recognized that such agencies are becoming more and more essential under our rapidly changing economic and social conditions. Such agencies in the field of utility and carrier rate-making are of long standing and are practically universally employed. There is no substantial disagreement regarding their necessity.

In the June, 1939, issue of the American Bar Association Journal is published for the first time an essay by Prof. Malcolm McDermott, Professor of Law, Duke University Law School, upon the subject, “To What Extent Should Decisions of Administrative Bodies Be Reviewable by the Courts?” The essay

received "the award in 1939 contest conducted by the American Bar Association pursuant to the terms of bequest of the late Judge Erskine M. Ross." Thus concisely does Prof. McDermott summarize the criticisms that have been directed against these bodies:

" * * * The well-recognized disadvantages pertaining to administrative action are the tendency toward arbitrariness, lack of legal knowledge, susceptibility to political bias or pressure, often brought about by uncertainty of tenure, a disregard for the safeguards that insure a full and fair hearing, and a dangerous combination of legislative, executive and judicial functions."

For several years past the American Bar Association has had under careful study the subject of administrative agencies through its special committee created for that purpose. The last (1938) report of that committee was drafted by its Chairman, Roscoe Pound, Dean of the Harvard Law School. It constitutes a comprehensive treatise upon the subject, dealing largely with methods and expedients recommended as therapeutics for the "disadvantages" pointed out by Prof. McDermott. We quote the portion of the report setting forth asserted principles which should govern "with reference to state as well as federal administrative agencies" touching the subject of factual judicial review:

"(2) Judicial review of findings of fact should be preserved to the extent of ascertaining whether there has been a finding as distinguished from an arbitrary pronouncement, and whether

that finding has a reasonable support in substantial evidence.

“(3) Judicial review should be jealously preserved to the extent of assuring due process of law by requiring a hearing of both sides, allowing each side to present its case fully and to meet fully everything to be used against it in arriving at a determination, precluding inspections with one party present and not the other, and interviews with representatives of one side in the absence of or without notice to the other.

“(4) Judicial review should be preserved to the extent of assuring action upon evidence rather than a preformed conception of the facts, and requiring determinations to proceed on the basis of full consideration of evidence and not on general ideas of expediency or getting things done.

“(5) Judicial review should be so limited as to insure (by requirement of record and findings) the three foregoing requirements, without substituting findings of fact or declarations of policy (within legal limits) by a court for findings or declarations committed by law to administrative agencies.” *American Bar Association Reports*, Col. 63, p. 361.

Appended to the report is a draft of a federal bill designed to effectuate the recommendations of the report. This draft was further considered in January, 1939, by the House of Delegates of the Association and adopted with some changes not pertinent here, and has been introduced in the Congress as S.

915, where it has received unanimous favorable report by the Senate Judiciary Committee. The provisions relating to the extent of factual judicial review reads:

“ * * * Any decision or order of any agency or independent agency shall be set aside if it is made to appear (1) that the findings of fact are clearly erroneous, or (2) that the findings of fact are not supported by substantial evidence, or (3) that the decision or order is not supported by the findings of fact, or (4) that the decision or order was issued without due notice and a reasonable opportunity having been afforded the aggrieved party for a full and fair hearing, or (5) that the decision or order is beyond the jurisdiction of the agency or independent agency, as the case may be, or (6) that the decision or order infringes the Constitution or statutes of the United States, or (7) that the decision or order is otherwise contrary to law.”

A similar committee of the Association's Section of Judicial Administration has for the past two years considered the subject as it related to state agencies. The report of that committee, which will be placed before the Section's meeting in July, is quite general in agreement with that of the Association's special committee, and is accompanied by a proposed uniform state bill.

(41) The “inconveniences” above pointed out, which constitute the main criticisms of administrative agencies, concern chiefly the subjects of personnel, the method of hearing and that of reaching and

recording decisions. To minimize these "disadvantages," Dean Pound's report recommends methods and expedients designed to improve the personnel and procedure of such agencies. The problem of personnel is not peculiar to this branch of government, it is inherent in every branch. The judicial department is not altogether free from it. And this is true not only with reference to the judges but also the juries—the triers of facts. The latter afford a perennial source of criticism. While the above Section report recognizes the possible eventuality of an ultimate holding by the Federal Supreme Court in line with the Ben Avon case, it is interesting to note that the report recommends that, where independent judicial factual review should be held essential to due process, such factual determination should be made by the judge and not the jury. In states where the common law distinction between law and equity is preserved this may be possible, at least where the reviewing proceeding is one in equity. But in this state, where the distinction between law and equity (other than to enforce the general principles of equity jurisprudence) has never been recognized, and the constitutional right of trial by jury is the same regardless of the proper classification of the case, it is difficult to conceive of that right being denied in a judicial proceeding held to require an independent factual review as an essential to due process. This, however, we hold not to be essential where, as here, the instrumentality created by the state is required to afford every essential to due process; as was held in the Wisconsin decision. Where, as here, a state, in the untrammelled exercise of its appropriate sov-

ereign powers, has delegated to a quasi-legislative (or quasi-judicial) agency the authority of factual determination under proper legal safeguards and according to recognized legal standards that meet every essential requirement of due process, judicial review of the orders of such agency as to its factual determination is limited to the question whether the prescribed legal standard of probative evidence has been met. And this, whether such standard be: the scintilla of evidence rule, in vogue in some states, but never recognized in this state (*Joske v. Irvine*, 91 Tex. 574, 44 S. W. 1059); the substantial evidence rule, quite generally applied and recommended in the above committee reports; the rule that the findings of fact must be found not to be "clearly erroneous" (proposed Federal act); or the rule that the evidence taken as a whole is such that "the minds of reasonable men could have come to the conclusion reached by the administrative agency (Chief Justice Rosenberry's above address)." This judicial review presents a question of law only.

The above inconveniences, if at all applicable to the Texas Commission, are so in but very slight degree. Certainly they have no application to the order under consideration.

The Texas Railroad Commission was created in 1891, under express constitutional authority, if not in fact mandate. Art. X, Sec. 2. This provision was adopted by the people of Texas in 1890, because it was then thought that the powers essential to the proper functioning of such agency could not be other-

wise delegated. The Commission was later (1894) expressly recognized in the constitution (Art. XVI, Sec. 30), its members made elective, and their tenure of office fixed at six years, with overlapping terms. In 1920 the legislature extended the rate-making function of the Commission to utilities, upheld in *City of Denison v. Municipal Gas Co.*, 117 Tex. 291, 3 S. W. (2d) 794. The Commission has had wide experience in rate-making in the several fields delegated to it; besides having at its disposal technical advisers of recognized expert ability, especially in the intricate and difficult field of rate-making valuation. Its members are selected by the qualified electorate of the entire state, just as are the Governor and Justices of the Supreme Court. Their tenure of office is the same as that of the Supreme Court Justices. Every safeguard to a fair and impartial decision was afforded in this instance. The hearing lasted some seven months, and every opportunity to present evidence and its views thereon was afforded the utility. The fact findings of the Commission were drawn with painstaking care, and, as we have held, are supported by abundant, if not in fact overwhelming, competent evidence. They have been most carefully and, as we believe, accurately analyzed in Justice Blair's opinion. Every practical requirement of due process has been fully satisfied by the Commission—unless the states are impotent to create effective fact finding agencies in the utility rate-making field.

To set this order aside on the ground that appellee is entitled to an independent review of the facts

would in effect be to transfer to the trial court the legislative function of rate-making, and require that court, through the intervention of a jury of men inexperienced in the technical and intricate subject involved, to substitute its judgment for that of the trained and experienced experts whom the law has provided for that purpose.

We are loath to believe that the Federal Supreme Court will set aside the order upon the invoked ground; and we are confirmed in the view that its mandate does not direct us to do so.

On the other hand, if ultimately our conclusion should not be upheld, it would be far better to have the issue definitely and authoritatively settled by the Federal Supreme Court in a review of our present judgment, than to subject this controversy, so important to a vast number of our citizenry as well as to the utility, to the delay, inconvenience, and expense necessarily incident to a remand for a new trial.

This court will lend every facility in its power to that end.

The purpose of this memorandum is not in any particular to alter or amend the views and holdings set forth in Justice *Blair's* opinion, but only to record the full concurrence of each member of this court therein.

McClendon, C. J. and Blair and Baugh, J. J. Concur.

EXHIBIT "F"

Application No. 24384

**IN THE SUPREME COURT
OF TEXAS**

LONE STAR GAS COMPANY, *Plaintiff in Error*,

VS.

STATE OF TEXAS, ET AL., *Defendants in Error*

APPLICATION FOR WRIT OF ERROR

TO THE HONORABLE THE SUPREME COURT
OF TEXAS:

Lone Star Gas Company, a corporation, being the appellee in a certain cause pending in the Court of Civil Appeals in and for the Third Supreme Judicial District of Texas, at Austin, Texas, Number 8238 on the docket of said Court and entitled thereon State of Texas, et al, Appellants, vs. Lone Star Gas Company, Appellee, comes now and complaining of the State of Texas, the Railroad Commission of Texas and the members thereof, Lon A. Smith, Ernest O. Thompson, and G. A. Sadler, and C. V.

Terrell, a former Railroad Commissioner, and of James V. Allred, former Attorney General of Texas, a party to this cause, all being appellants in said cause, and of Gerald C. Mann, now Attorney General of Texas, respectfully applies to this Honorable Court to issue its writ of error in this cause directed to the Court of Civil Appeals in and for the Third Supreme Judicial District of Texas, at Austin, Texas, to the end that this case may be removed from said Court of Civil Appeals to this Court and the record and proceedings herein may be fully reviewed by this Court and the judgment of the said Court of Civil Appeals rendered herein may be reversed and that of the District Court affirmed; and so that this plaintiff in error may be accorded any and all other relief to which it may be entitled under the law*

Original and Supplemental Motions for Rehearing.

The errors hereinafter assigned were duly assigned and presented in a Motion for Rehearing filed by plaintiff in error in said Court of Civil Appeals within the time required by law; and in a Supplemental Motion for Rehearing filed in said Court

*This case was reviewed in the Supreme Court of the United States on a printed record. When the Supreme Court remanded the case to the Court of Civil Appeals a copy of this printed record was deposited with the Court of Civil Appeals for its use; it being more convenient to use the printed record than the typewritten original. This copy of the printed record will accompany the typewritten original record to this Court and will be available for use by this Court. Accordingly, the record references in this application, with minor exceptions, are made to the printed record. Each volume of the printed record is indexed so as to show not only where the matter referred to in the index may be found in the printed record but also where it may be found in the typewritten original. The result is that references herein to the printed record are in effect also references to the typewritten original.

of Civil Appeals on May 15, 1939, under permission expressly granted by said Court of Civil Appeals (see order of Court of Civil Appeals overruling Motions for Rehearing). The Motion for Rehearing and the Supplemental Motion for Rehearing were both considered on their merits by the Court of Civil Appeals and were overruled on June 7, 1939; and this application has been filed within the time limited by law.

Designation of Parties.

In the Court of Civil Appeals the defendants in error were appellants and the plaintiff in error was appellee. In the Supreme Court of the United States the position and resulting designation of the parties were reversed. This has created considerable confusion and, to avoid such confusion as far as possible, the parties hereto will be referred to in this Application as they appeared and were designated in the District Court: the defendants in error as *plaintiffs* and the plaintiff in error as *defendant*.

The Railroad Commission of Texas will be referred to as the *Commission* and the Lone Star Gas Company, when not designated as the *defendant*, will be referred to as the *company*.

Statement of the Case.

(1) *General statement and history of case.*

The suit involves the validity of an order of the

Railroad Commission of Texas prescribing the maximum rate that may be collected by the defendant Gas Company for gas sold and delivered by it, in wholesale quantities, to distributing companies in the State of Texas. Such rate is referred to in the record as the "city gate rate."

The rate order in question was challenged by the defendant Gas Company not only as being "unreasonable and unjust to it"—the statutory ground of attack—(Article 6059, R. S. 1925) but, also, as being *confiscatory* in its application to the defendant's property and business and therefore repugnant to the Due Process Clause of the Fourteenth Article of Amendment to the Constitution of the United States. In fact, as the case was tried in the District Court, and especially considering the District Court's charge to the jury, the jury's verdict amounted to a finding that the rate, in its actual application to defendant's property and business, was *confiscatory*. The Supreme Court of the United States, discussing the charge given by the District Court, said:

"In view of the definition of 'fair return' and 'unreasonable and unjust' in the court's instructions, we are of the opinion that the issue for the jury to determine was in substance whether the rate was confiscatory. We so regarded a like submission in the case of *United Gas Public Service Co. v. Texas*, 303 U. S. 123." (*Lone Star Gas Co. v. Texas*, 304 U. S. 224, 231.)

Upon the jury's finding, made under the charge re-

ferred to, that the prescribed rate would not yield a fair return on the fair value of the Company's public service properties, the enforcement of the rate order against the Company was enjoined by the District Court.

Upon appeal, the Court of Civil Appeals, handing down its first opinion in the case, held that the rate was "just, reasonable and valid in every particular"; and the judgment of the District Court, declaring the rate order to be invalid, was reversed and the injunction restraining its enforcement was dissolved. (86 S. W. (2d) 484, 506.) The Court of Civil Appeals in that connection held that defendant's so-called "over-all evidence,"* being the evidence it offered relating to its *entire* "integrated operating system" and operations in both Oklahoma and Texas, was insufficient as a matter of law to sustain its attack on the rate order and that in presenting such evidence it "did not adduce the quantum and character of proof necessary to establish the invalidity of the rate as being confiscatory or unreasonable and unjust." (86 S. W. (2d) 502). Among other reasons assigned in support of this ruling was the claim that it was necessary for the defendant to make a proper segregation of its said over-all properties as between intrastate and interstate commerce or as

*The expression "over-all evidence" is used for convenience in this Application to indicate the evidence offered by the defendant to show that the rate was confiscatory when viewed in the light of, and tested by, the evidence relating to defendant's entire "integrated operating system in Oklahoma and Texas"—the property and operations considered by the Commission in prescribing the rate, as shown by its findings. It is the evidence offered on the same theory followed by the Commission and, as the Supreme Court said, "in direct rebuttal" of its findings.

between its Texas and Oklahoma operations and that the defendant had failed to do this.

Application for Writ of Error was refused by this Court.

Upon appeal to the Supreme Court of the United States that Court reversed the judgment of the Court of Civil Appeals and remanded the cause to the Court of Civil Appeals "for further proceedings not inconsistent with this opinion." *Lone Star Gas Co. v. Texas*, 304 U. S. 224, 242. The mandate is in the form that the Supreme Court always uses where it reverses the judgment of a state court. Robertson and Kirkham, *Jurisdiction of the Supreme Court*, p. 785 (note).

The details as to the holdings made by the Supreme Court of the United States are hereinafter fully stated, *infra*, pp. 87-97. It is sufficient for present purposes to state that the opinion of the Supreme Court of the United States necessarily imports that the evidence in the record was sufficient to support a finding by the "triers of fact" that the challenged rate order was confiscatory; otherwise, that Court reversed the judgment of the Court of Civil Appeals upon an entirely immaterial ground. The Court was reviewing the *ruling* made by the Court of Civil Appeals condemning the "over-all evidence" as being legally insufficient, and not merely the *reason* assigned by the Court in support of the ruling.

On its second review of the case the Court of Civil

Appeals made certain important rulings on questions of State law not made in its first opinion, and in addition to these rulings on questions of State law, made the identical ruling that it made on the first appeal—the ruling that was reversed by the Supreme Court of the United States: It *again* held—and in that connection repeatedly stated that it was “again” holding—that the validity of the city gate rate prescribed by the Commission was “conclusively established as a matter of law”; and that defendant’s evidence assailing the rate order was insufficient as a matter of law to show that the rate was “unreasonable and unjust” or confiscatory; and accordingly, it *again* reversed the judgment of the District Court declaring the rate order invalid and entered its judgment declaring the rate order to be “just, reasonable, nonconfiscatory and valid in every particular”; and again dissolved the injunction restraining its enforcement. (See Court of Civil Appeals Opinion, pp. 12, 49.)

(2) *Finding of the Court of Civil Appeals as to the overwhelming weight and preponderance of the evidence.*

The Court of Civil Appeals, upon its second review of the case, after holding that the evidence was insufficient as a matter of law to sustain the judgment of the District Court annulling and enjoining the challenged rate order, further held that the validity of the Commission’s city gate rate was established “factually from so overwhelming a weight and preponderance of the evidence as to require a

reversal in the interest of justice.” (Opinion, p. 49.) As to this ruling it properly may be observed:

(a) That the Court of Civil Appeals did not give proper effect to this ruling. This ruling properly would support only a judgment reversing the judgment of the District Court and *remanding* the case to that court. Instead, the Court of Civil Appeals reversed the judgment of the District Court and *rendered* final judgment against the defendant. It is obvious that the *judgment* of the Court of Civil Appeals, instead of being based upon the ruling here referred to, was based upon the additional ruling made by the Court of Civil Appeals, to-wit, that the evidence assailing the rate order as being “unreasonable and unjust” or confiscatory was insufficient as a *matter of law*.

(b) If the judgment of *rendition* was intended by the Court of Civil Appeals to be based upon its ruling that the judgment of the District Court was against the overwhelming weight and preponderance of the evidence, then the judgment of the Court of Civil Appeals is clearly erroneous and unauthorized—that Court having no power to make such a finding of fact the basis for the *rendering of final judgment*.

That the Court of Civil Appeals may not make such a finding of fact the basis for the *rendering of final judgment* has been settled law at least since the decision in *Choate v. S. A. & A. P. Railway Co.*, 91 Texas 406, 409-410, where, in a great opinion written by Chief Justice Gaines, the Court said: “It

had no power to make an original final determination of a question of fact." The Court of Civil Appeals "has no authority to substitute its findings of fact for those of the trial court." *Post v. State*, 106 Texas 500, 501.

The result is that, if the judgment of the Court of Civil Appeals, reversing the judgment of the District Court and *rendering* final judgment, was based upon its finding of fact that the judgment of the District Court was against the great weight and preponderance of the evidence, then the judgment of the Court of Civil Appeals is violative of the State Constitution and must be reversed; it having no power to make such a finding the basis for the *rendering* of final judgment. On the other hand, if the judgment of the Court of Civil Appeals was not based upon the finding of fact referred to, then that finding becomes immaterial. A finding of fact upon which the judgment is not based is obviously immaterial.

(3) *Alleged trial errors.*

The Honorable Court of Civil Appeals on its second review of the case sustained certain assignments of error presented by plaintiffs as appellants in that Court, and not considered at all by that Court on its first review of the case. These assignments of error complain of certain alleged trial errors committed by the District Court on the trial of the case. None of these trial errors was of such character as to authorize or require a reversal and the *rendering* of final judgment in the Court of Civil Appeals. One

assignment of error complained of the argument of counsel; another of an alleged error in the Court's charge; and still others of the *admission* and *rejection* of evidence. (*Infra*, pp. 199-208.)

The Court of Civil Appeals was not required or authorized to reverse the judgment of the District Court and then to *render* final judgment against the defendant because of the sustaining of these assignments of error, or any one of them. And it expressly appears from the opinion of the Court of Civil Appeals that its *rendering* of final judgment was not based on these alleged trial errors, or any of them. Instead, it was based upon the view of the Court of Civil Appeals that the evidence in the record before it was insufficient as a *matter of law* to raise the issue that the rate was unreasonable and unjust or confiscatory.

We deem it unnecessary to submit any further or more detailed statement of the case at this time. Full statements will be submitted under the assignments of error hereinafter presented.

Character of Questions Raised in This Court.

In its Application for Writ of Error, now presented, the defendant raises, not simply the question that the Court of Civil Appeals has failed to give due effect to the opinion, judgment and mandate of the Supreme Court of the United States, but also many other questions; some of these being questions

of State law decided by the Court of Civil Appeals for the first time on its second review of the case and finally determinable by this Court. The opinion of the Court of Civil Appeals expressly shows that important questions of State law, in addition to the involved Federal questions, were decided by the Court. Among the questions raised in this application are:

(1) That the Court of Civil Appeals has erroneously construed Article 6059, R. S. 1925, and in that connection has erroneously defined the "scope of judicial review" of rate orders of the Railroad Commission challenged as being "unreasonable and unjust" or confiscatory. In presenting this question we shall undertake to demonstrate that the opinion of the Court of Civil Appeals is in conflict with many opinions of this Court construing the railroad review statute (Articles 6453-4), the prototype of Article 6059.

(2) That the Court of Civil Appeals erred in holding that in a case like this no *issue of fact* can possibly arise; that on judicial review of a rate order only *questions of law* addressed to the "judicial mind" are involved; and that the reviewing court has no power to consider questions relating to the *credibility* of witnesses and the weight to be given their testimony or to settle *conflicts* in the evidence. Further, that the Court has erred in holding that the sole inquiry in a case like this is whether there is "substantial evidence" supporting the action of the Commission; the Court's holding ignoring the

fact that the statute requires only "clear and satisfactory" evidence and that evidence may be "clear and satisfactory" although it may be opposed by "substantial evidence."

(3) That the Court of Civil Appeals erred in holding that the evidence offered by the defendant, and in the record, was insufficient as a *matter of law* to show that the challenged rate order was "unreasonable and unjust" or confiscatory. In this connection the defendant shall undertake to demonstrate that the Court of Civil Appeals has determined an *issue of fact* and has made its determination the basis for the *rendering* of final judgment, in violation of the statutory and constitutional limitations on its authority.

(4) That the Court of Civil Appeals erred in holding that the District Court erred in holding that the record of the evidence heard by the Commission was not admissible as evidence on the *de novo* trial.

(5) Upon the first appeal the Court of Civil Appeals held that it was "manifest that the Legislature intended for the trial on appeal to be *de novo* and upon new or additional evidence pertinent to the issue, because the complainant is required to show by clear and satisfactory evidence that such rate is unreasonable and unjust as to it." The Court further held that the questions "of whether a rate is confiscatory or unreasonable and unjust have been held to be legal or justiciable *questions of fact*, and as to which the wider scope of judicial appellate review

seems to have been adopted by the Legislature and courts of this state." This holding conformed to that of the Commission of Appeals in *St. Louis South-western Ry. Co. v. State* (the Hillsboro depot case), 255 S. W. 390, in which it was held that the issues referred to are issues "of fact, and not of law."

In its second opinion the Court held, in effect, that the trial is not *de novo*. It held that "the rule on the statutory appeal to the court is that the trial judge shall admit and review the record of facts before the Commission, or its findings of fact, and such additional evidence as might aid in determining whether the rate order is based upon substantial evidence. * * * " (Opinion, p. 15.)

Many other important questions are raised in the application. No all-inclusive statement of the questions raised is here attempted. Our present purpose is merely to show that the case involves many questions other than the question as to whether the Court of Civil Appeals has given proper effect to the opinion, judgment and mandate of the Supreme Court of the United States.

Statement of Grounds of Jurisdiction and Questions Decided.

1. General Jurisdiction.

The nature of the case, as shown by the opinions of the Court of Civil Appeals and by the foregoing

Statement, is such that it clearly falls within the general, potential jurisdiction of this Court as defined in the Constitution and applicable statutes. It is obvious that the case is not one with respect to which the jurisdiction of the Court of Civil Appeals is made final under Article 1821, R. S. 1925, as amended, or under any other law of this State.

2. The Railroad Commission Is a Party.

This Court has jurisdiction under Section 5 of Article 1728, R. S. 1925, as amended, because the Railroad Commission of Texas is a party.

3. The Case Involves the Construction of an Important Statute.

As expressly appears from the opinions of the Court of Civil Appeals, the case involves the construction of a highly important statute, to-wit, Article 6059, authorizing judicial review of the gas rate orders of the Railroad Commission of Texas and defining and prescribing the mode and *scope* of such review.

The statute referred to provides that any gas utility dissatisfied with any rate order of the Commission may file its petition in the District Court of Travis County against the Commission as defendant and that said suit "shall be tried and determined as other civil causes in said court." The statute fur-

ther defines the burden of proof devolving upon the complaining party and the kind of evidence to be furnished as follows:

“In all trials under this article the burden of proof shall rest upon the plaintiff, who must show by clear and satisfactory evidence that the rates, * * * * * complained of are unreasonable and unjust to it or them.”

This statute was fashioned after the railroad judicial review statute (Acts of 1891, p. 55, codified in 1895 as Article 4565 and 4566, and in 1911 as Articles 6657 and 6658, and in the 1925 Code as Articles 6453 and 6454).

Construing this statute, this Court has held that the cases falling under it must be tried “as other civil causes in said court”; and that the issue as to whether the assailed rate order is “unreasonable and unjust” involves an inquiry of fact as well as one of law. These decisions are hereinafter cited, *infra*, pp. 29-30; and reviewed in detail, *infra*, pp. 43-49.

Construing Article 6059, the Court of Civil Appeals, departing from the rule announced in the cases last referred to, has held: (a) That the inquiry in the reviewing court as to whether the prescribed rate is “unreasonable and unjust” or confiscatory is a legal inquiry addressed to the “judicial mind” and involving no question of fact determinable by a jury or other “triers of the facts”; (b) that such a case properly may not be submitted to a jury;

(c) that the sole question determinable by the reviewing court in such a case is the question of *law* as to whether the assailed rate order is sustained by "substantial evidence"—the reviewing court having no power to determine questions of weight and credibility or to settle conflicts in the evidence.

In the Court of Civil Appeals the decision of the entire case was made to depend upon this construction of Article 6059. So construing the statute, the Court of Civil Appeals refused to give any effect to the verdict of the jury and the judgment of the trial court finding and adjudging that the prescribed rate order was *in fact* unreasonable and unjust and confiscatory, and held that the sole inquiry was whether the rate order was sustained by "substantial evidence"; and concluding that it was sustained by "substantial evidence," the Court of Civil Appeals rendered judgment reversing the judgment of the District Court and declaring the rate order to be reasonable, just, nonconfiscatory and "valid in every particular."

This Court clearly has jurisdiction of the case under Section 3 of Art. 1728.

4. Substantive Law Wrongly Decided.

Considering the nature of the case, as shown by the opinions of the Court of Civil Appeals, and the *parties*, it is obvious that it falls within the jurisdiction of this Court. For that reason, it is not

deemed necessary or even proper to make a detailed statement of the grounds of jurisdiction based upon and having reference to every assignment of error presented in the application.

It is now submitted that the Court of Civil Appeals has committed errors of substantive law affecting the judgment rendered, and has erroneously declared and applied the substantive law of the case in rendering judgment in the following important particulars, among others, to-wit:

(a) The Court of Civil Appeals has wrongly construed the statute (Article 6059) authorizing judicial review of the gas rate orders of the Railroad Commission and defining the mode and scope of such review. As to this, we adopt what has been said under the heading, "The Case involves the Construction of an Important Statute," *supra*, pp. 13-15.

See Assignments of Error One to Four, inclusive, and the Statement, Authorities and Argument thereunder submitted, *infra*, pp. 20-71.

(b) Having construed the judicial review statute as limiting judicial review to questions of law only, with no power in the reviewing court to consider questions of fact and to settle matters of weight and credibility and to settle conflicts in the evidence, even where, as here, the issue of *confiscation* is involved, the Court of Civil Appeals then erred in holding that the statute, thus construed and applied, afforded

adequate judicial review and "due process of law" as required by the Fourteenth Amendment to the Constitution of the United States. The holding is in clear conflict with the decisions of the Supreme Court of the United States hereinafter cited and reviewed, *infra*, pp. 73-75.

See the Fifth Assignment of Error and the Propositions, Statement, Argument and Authorities submitted thereunder, *infra*, pp. 71-75.

(c) The Court of Civil Appeals erroneously held that the District Court erred in excluding from evidence upon the trial of this case the record of the evidence heard by the Railroad Commission. This holding is in substantial conflict with the prior holding of the same Court of Civil Appeals on the first review of this case (86 S. W. (2d) 499); and is also in conflict with the opinion of the same Court of Civil Appeals in *Railroad Commission v. Rau*, 45 S. W. (2d) 413; and with its holding in *State v. St. Louis Southwestern R. Co.*, 165 S. W. 491.

The Court of Civil Appeals, in the same connection, erred in failing to hold that the action of the District Court in excluding from evidence the Railroad Commission record, if error at all, was only harmless error because the plaintiffs were accorded full and unrestricted right to introduce the same evidence, or any part of it that they wished to introduce, upon the trial *de novo* in the District Court; and they do not claim, or show from the record, that they were prejudiced by the action of the District

Court in excluding said Railroad Commission record in written form.

For further elaboration of these points see Sixth to Ninth Assignments of Error, and the Statements and Argument thereunder submitted, *infra*, pp. 75-82.

(d) The Court of Civil Appeals further erroneously held that, notwithstanding the judgment, opinion and mandate of the Supreme Court of the United States, it was left free to again review the entire over-all evidence and again determine whether such evidence was sufficient in law to sustain the defendant's attack on the rate order. It especially erred in holding that it was entitled to again make the same ruling that it made on its first review of the case, that is, that the over-all evidence was insufficient as a matter of law to sustain defendant's attack on the rate order as being confiscatory, by simply assigning new and additional reasons in support of that ruling, in lieu of the reason previously assigned in its first opinion and condemned by the Supreme Court. Said Court erred in failing to hold that the Supreme Court of the United States necessarily held that the over-all evidence was sufficient in law to sustain a finding of fact to the effect that the rate was confiscatory.

For further presentation and elaboration of these points see Assignments of Error Ten to Thirteen, inclusive, and the Statements and Arguments thereunder submitted, *infra*, pp. 83-97.

(e) Having affirmed its power, notwithstanding the opinion, judgment and mandate of the Supreme Court of the United States, to again review and consider the over-all evidence and to again determine its legal sufficiency to support the attack on the rate order, the Court of Civil Appeals erred in again holding, as its opinions show, that said over-all evidence offered by the defendant was insufficient as a matter of law to support its attack on the rate order; and that said over-all evidence offered by the defendant was insufficient as a matter of law to show in a "clear and satisfactory" way that the prescribed rate was confiscatory; and further, that said over-all evidence, considered in the light of the other evidence in the record, was insufficient as a matter of law to show that the rate order was not sustained by "substantial evidence."

Various important questions of law arising in this connection are fully presented in defendant's Assignments of Error Fourteen to Twenty-two, inclusive, and in the Statement, Propositions, Authorities and Argument submitted in the same connection, *infra*, pp. 97-159.

In the same connection the Court of Civil Appeals made certain other erroneous rulings affecting certain subsidiary, but important phases, of the *confiscation issue*, including ruling that certain items of property could not be properly included in the rate base; rulings relating to what should be allowed on account of annual accruals to the reserves for depreciation, depletion and amortization, fair rate of re-

turn, etc. These rulings are specifically complained of in Assignments of Error Twenty-three to Thirty-four, inclusive, to which reference is here made, *infra*, pp. 159-198.

(f) The Court of Civil Appeals further erred in holding that the trial court committed certain trial errors: (1) An error in its charge in defining the term "used and useful"; (2) in the admission and rejection of certain evidence; and (3) in permitting counsel for the defendant to present certain alleged improper argument to the jury.

These matters are fully covered by Assignments of Error Thirty-five to Forty-four, inclusive, and the Statements and Argument submitted thereunder, *infra*, pp. 199-209.

Defendant now presents its assignments of error together with supporting statements, authorities and argument.

I.

THE COURT OF CIVIL APPEALS ERRED IN ITS CONSTRUCTION OF ARTICLE 6059.

First Assignment of Error.

The Court of Civil Appeals erred in holding, in effect, that, in the judicial review accorded by Article 6059a, no power exists in the reviewing court,

sitting with or without a jury, to determine the credibility of the witnesses and the weight to be given their testimony, and that no power exists to settle conflicts in the evidence.

Second Assignment of Error.

The Court of Civil Appeals erred in holding, in effect, that upon the trial of this case in the District Court no issue of fact for the consideration of a jury could possibly arise and that such a case cannot properly be submitted to a jury.

Third Assignment of Error

The Court of Civil Appeals erred in holding, in effect, that even though the proper decision of a case like the instant one ordinarily involves an issue as to the value of the utility's property used and useful in the public service, such issue of value is not one of fact, but always one of law to be determined by the "judicial mind" of the court and not by a jury.

Fourth Assignment of Error.

The Court of Civil Appeals erred in holding, in effect, that the only issue that can be and is involved in a case like this is the question as to whether the Commission's rate order is sustained by substantial evidence.

First Proposition Under Assignments of Error One to Four.

The applicable statute provides that a case brought under it "shall be tried and determined as other civil causes in said court." The statute was fashioned after the railroad review statute (Articles 6453-6454); and the prior decisions of this Court and of the Courts of Civil Appeals, approved by this Court construing the railroad statute, have established the rule that such a case must be tried in accordance with the ordinary rules of procedure, except that the complaining party has the "burden of proof" to furnish "clear and satisfactory evidence." These decisions also hold that the duty to furnish "clear and satisfactory evidence" does not impose the burden of establishing the plaintiff's case by *undisputed evidence* and as a *matter of law*.

In enacting Article 6059 the Legislature, in effect, adopted the construction previously placed on the same language in the railroad statute (Articles 6453-4), and that construction now constitutes, in effect, a part of Article 6059.

Second Proposition Under Assignments of Error One to Four.

The statute imposes upon the complaining party in such a case the "burden of *proof*" to furnish "clear and satisfactory" *evidence* showing that the challenged rate is unreasonable, unjust or confisca-

tory. By imposing on the complaining party a given "burden of proof" to be *discharged* by furnishing "evidence," the statute clearly imports that the trial may involve issues of fact as well as issues of law. There can be no "burden of proof," in a proper sense, to furnish evidence on a given issue if the case is one that cannot possibly involve issues of fact. There can be no "burden of proof" in a case that can involve, as the Court of Civil Appeals holds, only questions of law. The holding of the Court of Civil Appeals to the effect that such a case cannot involve questions of fact determinable by a jury but only questions of law addressed to the "judicial mind" is in conflict with many prior opinions of this Court, including *Railroad Commission v. H. & T. C. Ry. Co.*, 90 Tex. 340; *Railroad Commission v. Weld & Neville*, 96 Tex. 394; *G. C. & S. F. Ry. Co. v. Railroad Commission*, 102 Tex. 338.

The holding of the Court of Civil Appeals to the effect that a case like this cannot involve any fact issues determinable by a jury is in direct conflict with the decision of the Commission of Appeals in *St. Louis Southwestern R. Co., v. State*, 255 S. W. 390, 391, involving the exact point, and in which it was held that such an injury is one of *fact* that properly may be submitted to a jury.

Third Proposition Under Assignments of Error One to Four.

The applicable statute says nothing about "substantial evidence." It requires "clear and satisfac-

tory" evidence; and these words had a settled legal meaning at the time the statute was enacted. According to that meaning, the party resting under the burden of furnishing "clear and satisfactory" evidence was not required to furnish *undisputed* evidence or to establish his case as a matter of law.

If the Legislature had intended to confine judicial review simply to the legal question as to whether the Commission's action was sustained by "substantial evidence" it would not have authorized a trial *de novo*, including the right to offer *new* and additional evidence never heard by the Commission; instead, it would have confined the trial to the record of the evidence heard by the Commission. To permit a trial *de novo*, including the introduction of new and additional evidence *never heard by the Commission*, could not be a proper way to determine whether the Commission's action was based on "substantial evidence."

Fourth Proposition Under Assignments of Error One to Four.

This statute does not impinge upon the authority of a court or jury trying disputed issues of fact. It requires the complaining party to furnish "clear and satisfactory" evidence. But it does not deny to the court or the jury the right to determine credibility of witnesses; the right to determine what part of the *testimony* constitutes *evidence*. In such a case "the credibility of witnesses and the weight to be given their testimony are questions solely with-

in the province of the jury, subject, however, to be revised by the trial court and the Court of Civil Appeals." (*Briscoe v. Bright* (Com. App.), 231 S. W. 1082, 1084.)

The ruling of the Court of Civil Appeals would give finality to the testimony of a *single* witness supporting the order, even though the witness might be impeached in the reviewing court; in fact, the ruling of the Court of Civil Appeals means that the testimony of any witness favoring the order is immune to impeachment.

Fifth Proposition Under Assignments of Error One to Four.

The language of the statute should be interpreted in the light of the fact that it defines a judicial duty to be performed by a court acting as a *court* and under *judicial* tests or standards. Whether a given rate is unjust and unreasonable or confiscatory, tested by judicial standards—and the reviewing court is not empowered to employ other than judicial standards—depends upon its actual application to the property or business of the complainant; it depends upon the facts showing how the rate actually applies, after it has been promulgated by the rate-making authority under *legislative* standards; such an inquiry is essentially one of fact. And the judicial tribunal conducting the inquiry must be empowered to weigh the evidence and in that process to determine the credibility of witnesses. It must have the

same power that it would exercise in any other judicial inquiry involving the issue as to whether a given act or action was “unreasonable and unjust.”

The fact that the rate-making board in the conduct of a purely *legislative* inquiry may have heard some “substantial evidence” tending to show that under *legislative* standards the proposed rate is just, reasonable and non-confiscatory does not mean that the rate is just, reasonable and non-confiscatory under *judicial* standards. And the fact that the reviewing court, applying judicial standards—standards that the Commission is not empowered to apply at all—may find that the rate is unjust, unreasonable and confiscatory does not mean that the reviewing court has substituted its finding or discretion for that of the Commission. The Court and the Commission conduct different inquiries under the guidance of entirely different standards.

Sixth Proposition Under Assignments of Error One to Four.

At all events, where, as in this case, the issue is duly tendered by the pleadings that the prescribed rate is so “unreasonable and unjust” in its actual application as to amount to a confiscation of the property of the complainant, and where, as here, the trial is limited to that degree of unreasonableness and unjustness amounting to confiscation of property, the reviewing court trying this constitutional issue of *confiscation* must be empowered to ascertain the

actual facts in respect to the application of the rate to the property and business of the complainant; and in that connection must be empowered to determine all questions of weight and credibility and to settle all conflicts in the evidence. The issue of confiscation, when properly tendered, is determinable originally and independently only in the courts and under the application of judicial standards; it presents a judicial, as distinguished from a legislative, inquiry. The applicable decisions of the Supreme Court of the United States, having controlling effect where the issue of confiscation is tendered, so hold.

Article 6059 contains no language requiring that it be construed as defining a scope of judicial review more narrow than that required by the decisions of the Supreme Court of the United States in cases where the issue is tendered that the property of the complainant is being confiscated, in violation of the Fourteenth Amendment, and in order to support the validity of the statute such construction should not be applied.

Seventh Proposition Under Assignments of Error One to Four.

Wholly apart from the decisions of the Supreme Court of the United States arising under the Fourteenth Amendment and discussed at length in the "Concurring Memorandum" opinion of the Court of Civil Appeals, the construction applied by the Court of Civil Appeals to Article 6059 renders it

unconstitutional under the State Constitution as construed by this Court. For that reason such construction should not be accepted. The statute contains no language requiring its acceptance.

Any inquiry as to whether the property of the citizen is being threatened with confiscation in violation of the Due Process Clause of the State Constitution is judicial in nature and may be conducted and decided only by a judicial tribunal. Whether the rate is confiscatory in its actual application involves a judicial inquiry into the *facts*. And the power to make that inquiry validly may not be vested in an administrative or quasi-legislative board. To hold that such board may conclusively determine the *facts* touching the claim of confiscation—even before the rate is promulgated—permits it to participate in an essential way in the judicial inquiry that must be conducted to determine the claim of confiscation; it vests judicial powers in the board. For this reason, the holding of the Court of Civil Appeals is in conflict with the decision of this Court in *Board of Water Engineers v. McKnight*, 111 Texas 82, 93; and if upheld will render Article 6059 unconstitutional under the rule announced in that case. That article contains no language requiring such construction and, in the interest of its validity, such construction should not be applied.

Statement.

1. See the second, third, fourth, fifth, sixth and seventh grounds of the Motion for Rehearing.

2. Evidencing its construction of Article 6059, R. S. 1925, and its views as to the "scope of judicial review" of a rate order of the Commission, such as is here involved, the Court of Civil Appeals in its opinion said:

"The specific attack made upon the rate order is that it is unreasonable, unjust and confiscatory because too low to afford the Gas Company a reasonable return on the fair value of its properties, situated in both Texas and Oklahoma, and used in the Texas public service. In adjudicating this question, *the scope of the judicial review* is to determine whether the rate order is based upon 'substantial evidence,' the burden being placed by statute (Art. 6059) on the Gas Company to show by 'clear and satisfactory evidence' that the rate order is not based upon substantial evidence, *or* that the rate prescribed will not afford the Gas Company a reasonable return on the fair value of its properties used in the Texas public service; and the question presented is one of *law* to be determined by the '*judicial mind*,' and not by a jury." (Opinion, 12-13; our italics.)

We further quote as follows:

" * * * * If a particular determination of the Commission or other agency is based upon substantial evidence, it is manifestly neither unreasonable, unjust nor confiscatory." (Opinion, 22; our italics.)

Repeatedly, and throughout its opinion, the Court states that the burden devolved upon the defendant to show, in support of its claim that the rate order was confiscatory, that the order was not based upon substantial evidence. The statutory requirement

that the plaintiff in such a case should furnish "clear and satisfactory evidence" was interpreted by the Court as imposing the burden to show by undisputed evidence that the rate order was confiscatory. Witness the following extract from the opinion:

" * * * The courts have no power or authority to disturb any conclusion made by it (the Commission) within its delegated power and authority when based upon substantial evidence." (Opinion, 22.)

In the "Concurring Memorandum" filed by the Court this statement is made:

"This judicial review presents a question of law only." (p. 11.)

Authorities.

Article 6059, R. S. 1925;

Railroad Commission v. H. & T. C. R. Co., 90 Tex. 340 ("The case must be tried by the ordinary rules of procedure");

Railroad Commission v. Weld & Neville, 96 Tex. 394, 403 (shall be determined "by the same rules that would be applied in determining a like question between other parties");

G. C. & S. F. R. Co. v. Railroad Commission, 102 Texas 338, 354 (The question is, "Would a jury be authorized to find a verdict that such rates, charges, etc. were unreasonable and unjust?");

St. Louis Southwestern Ry. Co. v. State, 255 S. W. 390—the Hillsboro Depot Case (The issue as to whether a rate was unjust and unreasonable “was one of fact, and not of law”);

Houston Chamber of Commerce v. Railroad Commission, 19 S. W. (2d) 583, 587, (“trial . . . governed by same rules as civil cases generally”);

Railroad Commission v. San Antonio Compress Co., 264 S. W. 214 (“No distinction . . . between this character of suit and any other civil proceeding”);

P. & N. T. R. Co. v. Railroad Commission, 193 S. W. 770 (Issue tried as one of fact before a jury);

Railroad Commission v. P. & N. T. R. Co., 212 S. W. 535 (The same holding on second appeal of same case).

The requirement to furnish “clear and satisfactory evidence” is imposed by law in many situations, and it has been held that the imposing of this burden does not deny the power of the court or jury to determine all questions of weight and credibility and to settle all conflicts in the evidence:

Briscoe v. Bright’s Administrator, (Com. App.) 231 S. W. 1082;

Reinhardt v. Nehring (Com. App.), 291 S. W. 873;

Jarnatt v. Cooper, 59 Cal. 703, 706;

Chicago, etc. R. R. Co. v. Nebraska Railroad Commission, 124 N. W. 477, 26 L. R. A. (N. S.) 444;

Corporation Commission v. People's Freight Line (Ariz.), 16 Pac. (2d) 420.

Before the commission was created and rate regulation attempted, the courts had authority, in suits brought by shippers, to determine whether applied rates were *unjust and unreasonable*. And "The province of the courts is not changed, nor the limit of judicial inquiry altered, because the legislature instead of the carrier prescribes the rates":

Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 397;

Railroad Commission v. H. & T. C. R. Co., 90 Texas 340, 353, 354.

Where the complaining party, in addition to the statutory issue of unjustness and unreasonableness, tenders the issue that the rate is *confiscatory* the reviewing court will independently determine all issues of fact relating to the actual application of the rate; that the rate-making authorities may have heard "substantial evidence" is immaterial in such a case:

St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 50-52, and authorities cited:

Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287, 289;

Crowell v. Benson, 285 U. S. 22, 57;

Bluefield Water Works Co. v. Public Service Commission, 262 U. S. 679, 689;

United Railways v. West, 280 U. S. 234, 251.

The Railroad Commission is not empowered to conduct any hearing or make any finding on the issue as to whether a given rate is confiscatory. The issue of confiscation cannot arise at all until after the rate has been promulgated. And when it does arise, it is determinable only in the courts. Whether a rate order is confiscatory in its actual application to the property and business of the complainant is a judicial inquiry, determinable only under judicial standards, and only by a judicial tribunal:

Board of Water Engineers v. McKnight, 111 Texas 82.

Argument.

1. *The language of the statute.*

The Court of Civil Appeals' construction of Article 6059 is conclusively answered by the language of the statute itself. In fact, the Court's opinion shows that in construing the statute it gave little attention to the language of the statute. Instead of sticking with the plain language of the statute, the Court, in its main opinion and in its "Concurring Memorandum" opinion, enters upon a lengthy discussion of various decisions of the Supreme Court of the United States and of state courts not based upon such a statute, and of other extraneous matters, and, in that way, arrives at an interpretation of the statute not supported by any language contained in it and in fact in conflict with its plain language. The Court ignores the rule that where the words of a

statute are clear, "they are its only expositors." *Pirie v. Chicago Title Co.*, 182 U. S. 438, 451. The clear words of a statute are not to be bent either the one way or the other. *United States v. Hartwell*, 6 Wall, 385, 396. They may not be "altered in the interest of an imagined intent." *United States v. Riggs*, 203 U. S. 136, 139.

We respectfully submit that interpretation, properly applied, begins with the language of a statute and, in the absence of ambiguity, ends there. "The province of construction lies wholly within the domain of ambiguity." *Hamilton v. Rathbone*, 175 U. S. 414, 421. We therefore first consider the plain language of this statute.

Article 6059 provides that a case brought under it "shall be tried and determined as other civil causes in said court"—referring to the district court of Travis County.

"Other civil causes" are not "tried and determined * * * in said court" under any such standard of proof or rule of decision as that announced by the Court of Civil Appeals in its construction of this statute. "Other civil causes" that are "tried and determined * * * in said court" involve *factual* as well as legal issues and determinations. They involve questions of credibility of witnesses and weight of evidence, as well as questions of law.

The statute further provides:

"In all trials under this article the *burden of proof* shall rest upon the plaintiff, who must show by clear and satisfactory *evidence* that the rates, regulations, orders, classifications, acts or charges complained of are unreasonable and unjust to it or them." (Article 6059; our italics.)

This provision clearly points to the nature of the inquiry had under the statute; it is a factual inquiry. The complaining party has the "burden of proof" to show by "clear and satisfactory" *evidence* that the rate is unjust, unreasonable or confiscatory. The language "*burden of proof*" properly is applicable only to the settlement or determination of issues of *fact*. "Proof" is offered on issues of *fact* but not on issues of *law*. "Evidence" is offered on issues of *fact* but not on issues of *law*. If no question is involved in such a case except a *question of law*, then why did the statute impose on the complaining party the "burden of proof" to furnish *evidence* in support of his attack on the challenged order? How can there be any burden of *proof* in a case that cannot possibly involve anything but questions of law? Would any one say, for example, that upon the issues arising under a general demurrer to the plaintiff's petition in a civil case the plaintiff has the "burden of proof" to furnish "clear and satisfactory" evidence? To say the least of it, the expression "burden of proof" to furnish "evidence" is inappropriately and misleadingly used when it is used in describing the duty or burden of establishing the correctness of a given *legal* proposition or contention. On the other hand, it is correctly used when it describes the burden resting upon one in the conduct of a *factual* inquiry.

It must be admitted that the statute does not *expressly* impose any such burden on the complaining party as that defined in the opinion of the Court of Civil Appeals. The statute says nothing about "substantial evidence." It requires "clear and satisfactory" evidence, and these words, as we shall hereafter demonstrate, had a settled legal meaning at the time the statute was enacted. According to that meaning, evidence supporting the affirmative of a given issue may be "clear and satisfactory" even though there may be "substantial evidence" supporting the negative. There may be *issues of fact* even though one of the parties rests under the "burden of proof" to furnish "clear and satisfactory" evidence.

In many situations the law imposes upon the plaintiff the burden of furnishing "clear and satisfactory" evidence, and, yet, such cases are "tried and determined in said court" every day as "other civil causes" are there tried and, therefore, as being causes involving *issues of fact*.

The "standard of proof" or rule of decision to be applied in determining the legal effect of the evidence as a whole has nothing to do with the credibility of witnesses or the settling of conflicts in the evidence. Matters of weight and credibility must first be settled in every case before applying the standard of proof—whatever it may be—determining the legal effect of the evidence as a whole. The burden to furnish a given kind of evidence, more persuasive than a bare "preponderance of the evidence," de-

tracts nothing from the power of the triers of fact to determine all questions of credibility and weight. This is true even where the "standard of proof" imposes a greater burden than the burden to furnish "clear and satisfactory" evidence; even when the party is required to prove his case "*beyond a reasonable doubt*." Even that "standard of proof"—the most onerous known in the law—does not eliminate questions of fact; it does not eliminate questions of *weight* and *credibility*; it does not convert the inquiry into a purely legal one addressed only to the "judicial mind"; this is recognized in the trial of every criminal case.

There is no *express* requirement in this statute that the reviewing court must render judgment sustaining a rate order if the evidence is conflicting without even attempting to settle the conflicts. There is no *express* requirement that the plaintiff in such a case must furnish undisputed evidence. There is no *express* requirement that judgment must be rendered against the plaintiff without settling any question relating to credibility or weight and merely upon a decision of the legal question as to whether there is "substantial evidence" supporting the order.

There is no *express* denial in the statute of the power of the reviewing court to settle conflicts in the evidence arising because of questions affecting the *credibility* of witnesses and the *weight* to be given their testimony. The Court of Civil Appeals has evolved these requirements by mere implication from

the language of the statute requiring the complaining party to furnish "clear and satisfactory" evidence.

If the Legislature had intended to confine judicial review simply to the question whether the Commission's action was sustained by substantial evidence, then why did the Legislature authorize a trial *de novo* involving and including *new* and additional evidence? If the Legislature intended that the judicial inquiry in the reviewing court should extend no further than to the legal question as to whether the Commission acted on "substantial evidence," then why did not the Legislature confine that determination to the Commission record? To permit a trial *de novo* in the reviewing court, including the introduction of new and additional evidence — evidence that the Commission never heard—could not be a proper way to determine whether the Commission had acted on "substantial evidence." It is submitted that this right to try the involved issue *de novo* argues strongly, if not conclusively, against the "substantial evidence" rule announced by the Court of Civil Appeals and in favor of the "wider scope of judicial review" that involves an issue of *fact* as to whether the Commission's action is unreasonable and unjust or confiscatory. The right to introduce new evidence, coming from witnesses never heard by the Commission, argues strongly if not conclusively that the reviewing court *ex necessitati* has the power to determine the credibility of these witnesses.

As was said by Mr. Justice Holmes of a given

construction of the Sherman Anti-Trust Law in *Northern Securities Co. v. United States*, 193 U. S. 197, 407, the Court of Civil Appeals in thus construing Article 6059 has found something that "somehow breathes from the pores of the act, although it seems to be contradicted in every way by the words in detail."

We respectfully submit that the burden imposed on a party to establish his case by "clear and satisfactory" evidence does not carry with it, by implication or otherwise, the burden of proving the case by *undisputed* evidence. Nor does such a rule mean that such a party carrying the burden must lose his case as a *matter of law* if the evidence is merely conflicting, or if there should be any "substantial evidence" on the other side of the issue. It seems obvious that the fact that there may be "substantial evidence" favoring one side of a given issue does not mean that as a matter of law the other side of the same issue could not be supported by "clear and satisfactory evidence." Or, stated otherwise, it seems clear enough that evidence may be "clear and satisfactory" even though it may be opposed by "substantial evidence."

The statute, as we construe it, in no way affects or denies the power of a reviewing court, acting with or without a jury, to distinguish between the mere *testimony* of witnesses and *evidence*. Correctly construed, the statute requires the reviewing court, after finding independently and by a process involving the right to sift the evidence and determine all

questions of the credibility of witnesses, to sustain a rate order if the attack on it has not been supported by "clear and satisfactory" *evidence*.

The statute provides that such a case must be tried "as other civil causes in said court"; and further, that the complainant has the burden of showing by "clear and satisfactory evidence" that the rate is unreasonable and unjust or confiscatory. This is a "standard of proof" or legal test to be applied by the court in determining the legal sufficiency of the evidence after it is all in. In doing this the Court assumes that all questions of mere weight and credibility or of conflicts in the evidence may be settled by the jury in favor of the complainant. The statute defines a more onerous burden than that imposed on the plaintiff in an ordinary case, but it does not interfere with the right of the jury to determine questions of weight and credibility and to settle conflicts. The Commission of Appeals so held in *Briscoe v. Bright's Admr.*, 231 S. W. 1082, involving the application of the same "standard of proof."

This statute does not impinge upon the authority of a court or jury in trying disputed issues of fact. It requires the complaining party to furnish "clear and satisfactory" evidence. But it does not deny to the jury the right to determine what part of the *testimony* constitutes *evidence*.

If the complaining party furnishes *testimony* showing in a clear and satisfactory way that the order is unjust, unreasonable or confiscatory, and

the testimony furnished on the other side is of such character that it properly may be discredited by the jury, then the rule laid down in the statute has been satisfied. In other words, the complaining party has furnished clear and satisfactory *evidence*.

Every case involves a *controversy* and most often a controversy concerning the *facts*. A fact controversy is the essence of the ordinary rate case; the constitutional rights of the plaintiff in such a case "depend upon what the facts are found to be." When the facts are settled "the law is tolerably plain." Per Mr. Justice Holmes, *Prentis v. Atlantic Coast Line*, 211 U. S. 210, 228. The settling of this fact controversy is most often the very purpose of the suit.

A rate case such as this ordinarily involves questions relating to the *value* of the utility's property and related questions—*questions of fact*. In *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, 228, the Court said:

"Whether their property was taken unconstitutionally depends upon the *valuation* of the property, the income to be derived from the proposed rate and the proportion between the two—pure *matters of fact*. When those are settled the law is tolerably plain. All their constitutional rights, we repeat, depend upon what the *facts* are found to be." (Our italics.)

On the issue as to the *value* of property, opinion evidence is usually offered and almost always ques-

tions arise concerning the qualifications of the experts and other matters affecting their credibility. Lack of power to settle issues affecting the credibility of witnesses appearing before a court amounts to lack of power to function as a court. Lack of power to consider the qualifications and credibility of witnesses in a rate case implies lack of power properly to try such a case. That very clearly appears from the opinion of the Court of Civil Appeals in this case. The opinion discloses that the Court of Civil Appeals has decided a question of fact, as distinguished from a question of law. Witness the Court's discussion of the credibility of witnesses testifying at the trial. For example, its discussion of the testimony of the Commission's witnesses Dobson and Robinson in respect to excavation costs (Opinion, pp. 38-40). The Court gave great weight to the testimony of the witness Dobson. That witness admitted that the estimate given by him at the trial was considerably higher than the estimate made by him when he testified before the Commission. (IV, R., 2792). He used only three days in his inspection tour of the company's system. He further testified that he had never done any excavation work in connection with cross country natural gas pipe line construction, and that his estimate of excavation costs did not include any provision for the hauling in of dirt to be used for the bedding of pipe and rock (IV, R. 3794); and that his estimate made provision for only so much bell hole excavation as could be handled by two men back of the ditching machine.

It is perfectly obvious that the testimony of this

witness, as well as the testimony of other witnesses, can be appraised only by settling questions of credibility, including questions relating to his qualifications. These questions the Court of Civil Appeals has undertaken to determine. The Court's opinion expressly shows that an ordinary rate case, involving, as it does, as the very basis of the controversy, questions relating to the *value* of the property of the public utility, cannot be tried by a tribunal that has no power to decide questions of weight and credibility.

Under the ruling made by the Court of Civil Appeals, the plaintiff in a rate case cannot recover except upon proof that there is an absence of controversy concerning the facts; the facts must be undisputed. If there is a conflict in the evidence, the court is powerless to settle the conflict, and, for that reason, powerless to give the plaintiff relief. The rulings made by the Court of Civil Appeals make the reviewing court in a rate case a new kind of judicial tribunal; that is, one that is without power to examine the facts of a case at all, except for the purpose of determining whether they are disputed. Finding that they are disputed, the reviewing court is required to ignore the dispute and leave it unsettled and yet *affirmatively* decide the case in favor of one of the litigants.

The Court of Civil Appeals in its opinion asserts in effect that the trial and determination of a case like this "as other civil causes" in the reviewing court designated by the statute would lead to "utmost ab-

surdity" (Opinion, 18); that such a cause may not properly be submitted to a jury. And in that connection the Court comments upon the inability of an average non-expert jury to determine the issues of fact presented in such a case (Opinion, 16-20).

This amounts simply to an argument against the enactment of the statute; it amounts to an argument that the Legislature may have made a mistake in enacting a statute providing for the "wider scope of review" involving the determination of issues of *fact* as well as issues of law. But because a court may believe that a statute is unwise or that a mistake has been made by the Legislature cannot affect the plain meaning of the statute. The discovery of a mistake is not the discovery of an ambiguity. The Court is not responsible for legislative mistakes; and the legislative will, plainly expressed, properly may not be thwarted by judicial construction having no better foundation than judicial belief that a legislative mistake has been made. Legislative wisdom is not to be supplied by judicial construction, nor does wisdom define a limit on legislative power.

After emphasizing the alleged inability of courts and juries to intelligently consider and solve the technical questions presented in rate cases, the Court of Civil Appeals then affirms the duty and power of the reviewing court to determine whether the Commission's findings are supported by substantial evidence. The one inquiry is as technical as the other. The work of interpreting the evidence in such a case remains the same, whatever may be the "standard

of proof" or test to be applied in arriving at a decision. If the reviewing court is unable properly to determine the issues in an independent review of the facts, it is equally unable properly to determine whether the findings are supported by substantial evidence. This is true because if technical knowledge is required in the one instance, it is required in the other; that is, it requires the same technical knowledge to determine whether the evidence introduced before the Commission is substantial as is required to determine the probative effect of such evidence when considered independently of the Commission's record. A court that is unable to understand technical evidence, and for that reason unable to pass an "independent judgment" upon the facts as well as the law, is equally unable, and for the same reason, to determine whether the same technical evidence introduced before the Commission is substantial in character and therefore adequate and sufficient to support a finding.

2. The decisions of this Court construing the statute.

The views we have here expressed are sustained not only by the language of the statute, fairly and reasonably construed, but by the decisions of this Court and of the Courts of Civil Appeals approved by this Court that have construed the statute upon which Article 6059 was patterned. We pass now to a consideration of these decisions.

Article 6059 is a substantial copy of the review

sections (6 and 7) of the original Railroad Commission Act of 1891 (Acts of 1891, p. 55) codified in 1895 as Articles 4565 and 4566; and in 1911 as Articles 6657 and 6658. The last sentence of Article 6059 dealing with the burden of proof is identical with Section 7 of the original act, Article 4566, R. S. 1895; Article 6658, R. S. 1911. In 1925 (39th Legislature, Ch. 201, Sec. 1) additions were made to the first article, brought forward into the 1925 revision as Article 6453, but these additions relate only to the matter of preliminary injunctions and temporary restraining orders. The burden of proof statute was at the same time changed by eliminating the "clear and satisfactory evidence" condition. See Article 6454, R. S. 1925.

Consequently, the case construing the Railroad Commission Act relating to railroad rates are controlling. Indeed, Article 6059 as enacted in 1920 (36th Legislature, 3rd C. S., p. 18, Ch. 14) represents a legislative reenactment of the railroad rate review statute as it had theretofore been construed by the Supreme Court.

The first case construing the railroad judicial review statute was that of *Railroad Commission v. H. & T. C. Ry. Co.*, 90 Tex. 340. In that case this Court held that "the conferring of that jurisdiction upon the courts, of itself, imposed the duty to try the case by the ordinary rules of procedure, unless otherwise provided."

In *Railroad Commission v. Weld & Neville*, 96

Tex. 394, 403, the Court held that the reasonableness of rates when determined in such a suit was to be determined

“by the same rules that would be applied in determining a like question between other parties.”

In subsequently decided cases similar views have been expressed. In *G. C. & S. F. R. Co. v. Railroad Commission*, 102 Texas 338, the Supreme Court, in an opinion written by Mr. Justice Brown, said:

“It follows that the petition must contain *allegations* of such facts and circumstances as would, if true, authorize the Court to adjudge the rate to be unjust and unreasonable as a matter of law.” (p. 352.)

This statement is, of course, correct because the petition in any kind of civil case must contain *allegations of fact*, which, if proved, establish the plaintiff's right to recover as a matter of law. That is the question arising on every general demurrer.

The language above quoted is further illuminated by what Mr. Justice Brown said on the motion for rehearing in the same case:

“The question presented to us is, if the facts alleged in the applicant's petition shall be established by ‘clear and satisfactory evidence’ *would a jury be authorized to find a verdict* that such rates, charges, etc., were unreasonable and unjust to the appellant? In passing upon the question we must consider the allegations in the petition as facts proved by ‘clear,

satisfactory and uncontroverted evidence.' ” (p. 354.)

If there can be no fact issue in such a case, then there is no point in saying, as did Judge Brown, that the petition should allege facts that “if true” make out a case as a matter of law; and there was no point in saying, as he did on rehearing, that the question at issue was whether the pleadings charged facts that would authorize a jury “to find a verdict” that the rates in question “were unreasonable and unjust to the appellant.”

Coming from Mr. Justice Brown, this language is very significant, especially considering his close connection with the origin of the Railroad Commission and the statute giving it the power to regulate railroad rates.

In so far as administrative orders are concerned, the holding of the Commission of Appeals in the *Hillsboro Depot Case, St. Louis Southwestern Ry. Co. v. State*, 255 S. W. 390, is distinctly contrary to the holding now made by the Court of Civil Appeals. In that case the Court of Civil Appeals held that the District Court erred in refusing to peremptorily instruct a verdict (165 S. W. 491). The Commission of Appeals, after holding that the evidence was not undisputed and admitting that the preponderance of the evidence was against the jury verdict, then applied the ordinary Texas rule that denies the right of the Court of Civil Appeals to substitute its findings for those of the jury as the basis for the ren-

dering of final judgment. We quote as follows from the opinion:

“Under article 6658 of the Revised Statutes of Texas, the burden of proof was on the railway companies to show by clear and satisfactory evidence that the apportionment of cost was unreasonable and unjust. But in this case the issue as to whether the apportionment of cost was unreasonable and unjust *was one of fact, and not of law*. The jury was instructed that before it could find that the order was unreasonable and unjust in this respect, it must so appear by clear and satisfactory evidence. It therefore follows that the trial court did not err in refusing to direct a verdict for the state. The Court of Civil Appeals was without authority to substitute its finding on this issue for that of the jury. However, that court was within its rights in holding that ‘the preponderance of the evidence shows that the apportionment thus made is just and reasonable,’ and having so held, should have reversed the judgment of the trial court and remanded the cause. Patrick v. Smith, 90 Tex. 267, 38 S. W. 17; Stevens v. Master-son, 90 Tex. 417, 39 S. W. 921; H. & T. C. Ry. Co. v. Strycharski, 92 Tex. 1, 37 S. W. 415; Irving v. Freeman, 106 Tex. 38, 155 S. W. 931; Post v. State, 106 Tex. 500, 171 S. W. 707.” (255 S. W. 391; our italics.)

The holding of the Commission in the case referred to is in direct conflict with the holding of the Court of Civil Appeals in the instant case; the two cannot be harmonized.

In *Houston Chamber of Commerce v. Railroad Commission*, 19 S. W. (2d) 583, 587, Chief Justice

McClendon said: "The trial in such a proceeding is by express statute governed by the same rules as civil causes generally, and there is no limitation other than that which affects civil causes generally upon the rights of the parties to be heard or to introduce evidence."

In *Railroad Commission v. San Antonio Compress Co.*, 264 S. W. 214, 217, the Court of Civil Appeals said:

"No distinction is to be made between this character of suit and any other civil proceeding."

And on motion for rehearing the Court further said:

" * * * the orders of the Railroad Commission, when called in controversy by suit, must be subject to the action of the courts in the same manner and subject to the same orders and method of procedure as any other civil suit, except where specifically stated otherwise."

It is true that in these cases it was recognized that an added burden, created by the statute, devolves upon the complaining party. He must furnish "clear and satisfactory" evidence, as distinguished from a mere preponderance of the evidence. But in none of these cases was it held or even intimated that this statutory rule was effective to deprive the jury of its power to consider and determine the credibility of witnesses and the weight to be given their testimony. In none of them was it held that the plaintiff in such

a case was required to establish his case by undisputed evidence.

In *P. & N. T. R. Co. v. Railroad Commission*, 193 S. W. 770, the Court of Civil Appeals reversed a judgment of the District Court of Travis County setting aside an order of the Railroad Commission as being unjust and unreasonable, wherein the issue mentioned had been determined by the verdict of the jury under a charge defining the burden imposed by this statute. The judgment was reversed because the jury's answers to special issues were conflicting. This amounted to a ruling that issues determinable by a jury may properly arise in such a case; otherwise conflicts in a jury's findings would be immaterial. And upon the second appeal of the same case (212 S. W. 535) the judgment of the District Court, setting aside the Commission's order as being unjust and unreasonable, under findings made by the jury, was affirmed. The Court considered at length certain alleged trial errors that could have been material only on the theory that they might have affected the fairness of the jury trial. In each instance this Court refused a writ of error.

The Court of Civil Appeals has stated that Article 6059 does not in terms authorize a trial *de novo*. The statement would be equally applicable to the railroad rate statute, and yet there is no decision construing or applying the railroad rate statute in which the Court has held that the trial in the District Court is upon the record made before the Railroad Commission. And there is no decision construing or

applying the statute in which the Court has held that the rate order is required to be sustained as a matter of law unless it be shown at the trial in the District Court that there was no substantial evidence before the Commission in support of its order.

Indeed, all of the cases reviewing the railroad rate statute have either assumed that the statute contemplated a trial anew, upon issues of fact, or have expressly dealt with the Commission record in such a way as to leave no doubt that a *de novo* trial was contemplated. This is sufficiently shown by the railroad rate cases reviewed and considered in the opinion of the Court of Civil Appeals, per Chief Justice McClendon, in *Houston Chamber of Commerce v. Railroad Commission*, 19 S. W. (2d) 583 (affirmed by the Supreme Court in *Railroad Commission of Texas v. Houston Chamber of Commerce*, 124 Tex. 375, 78 S. W. (2d) 591).

3. *Other cases determining what is meant by the "burden" to furnish "clear and satisfactory" evidence.*

We further submit that the statutory rule that requires the complaining party to furnish "clear and satisfactory" evidence should be construed in the light of the settled meaning ascribed to this language by previously decided cases involving alleged parol trusts, cases of mistake and fraud, and other cases imposing a like burden. In these cases it has been held that the rule requiring "clear and satisfactory" evidence is one of law to be applied by a court to all

of the evidence, and that it is not a rule that deprives the jury of its right to consider and determine the credibility of witnesses and the weight to be given their testimony. *Carl v. Settegast*, 237 S. W. 238; *Briscoe v. Bright's Administrator*, 231 S. W. 1082, 1084. In the case last referred to the Commission of Appeals, discussing this rule requiring "clear and satisfactory" evidence, said:

"In this, as in every other class of cases that we now recall, the credibility of the witnesses and the weight to be given to their testimony are questions solely within the province of the jury, subject, however, to be revised by the trial judge and the Court of Civil Appeals."

In *Carl v. Settegast*, *supra*, the Commission of Appeals quoted with approval what it had previously said in *Briscoe v. Bright's Administrator*, *supra*, in respect to the power of the trial court to determine questions of weight and credibility, even where it is called upon to apply the standard of proof requiring the plaintiff to furnish "clear and satisfactory" evidence.

In *Reinhardt v. Nehring*, 283 S. W. 347, the Court of Civil Appeals had before it a will case arising under a statute requiring that certain facts be proved "to the satisfaction of the court." The case had been tried to a jury; and the Court, although recognizing that the statute imposed a burden more onerous than that imposed in the ordinary civil case, dealt with the case as involving an issue of fact and not merely

an issue of law. The judgment of the Court of Civil Appeals was reversed by the Supreme Court (291 S. W. 873) because the trial court's charge as drawn imposed a burden that was too onerous. The Supreme court, however, held that such a case involves an issue of fact to be determined by the jury, and said:

“Jurors are entitled to pass on the weight and value of any circumstances having any probative force.”

It was held by the Supreme Court that this statute defined a rule to be applied by the court to all of the evidence, and not a rule limiting or affecting in any way the right of the jury, or court without a jury, to settle conflicts in the evidence and all questions affecting the credibility of witnesses. Such a rule is to be applied *only* after conflicts in the evidence, including those created by questions affecting the credibility of witnesses, have been settled and the court or jury has thereby determined what part of the testimony constitutes evidence.

From *Jarnatt v. Cooper*, 59 Cal. 703, 706, we quote:

“It is doubtless a well settled rule that the party alleging fraud or mistake is bound to prove his allegation by *clear and convincing evidence*. That is, that the evidence which tends to prove the alleged fraud or mistake, if standing alone, uncontradicted, would establish a clear *prima facie* case of fraud or mistake. If it does not, this Court may reverse the

judgment on the ground of insufficiency of the evidence to justify the decision. But where the evidence which tends to prove fraud or mistake, if standing alone, uncontradicted, is sufficiently clear and convincing, we can not reverse the judgment on the ground that such evidence is contradicted by other evidence, because the right to pass upon the credibility of witnesses is not vested in this Court. The only question we have to decide in respect to the sufficiency of the evidence, is whether that which tends to prove the alleged fraud or mistake, if standing alone, without contradiction, would make out a *prima facie* case."

It has been held that under a statute like this, applicable to railroads, the expression "clear and satisfactory evidence" must be interpreted in the light of the previously decided cases involving the issue of fraud or mistake affecting a written instrument. *Chicago, etc., R. R. Co. v. Nebraska Railroad Commission*, 124 N. W. 477, 26 L. R. A. (N.S.) 444. The Court in that case further held:

"The question in such a case is not, did the jurors draw the correct conclusions from the evidence before them, did they give credit to witnesses who were unworthy of credit, and disbelieve other witnesses whose evidence was more reliable, thereby reaching an erroneous conclusion,—but, was there sufficient evidence before them from which, if they believed it, the conclusion might be drawn." (26 L.R.A. (N.S.) 449.)

The Supreme Court of Arizona in *Corporation Commission v. People's Freight Line*, 16 Pac. (2d) 420, in construing a similar statute, said:

"It will be seen, upon examining the language of this section, that the proceeding is not an appeal from the decision of the commission, but is a new and independent action. The case is heard *de novo* upon such evidence as may be proper, and not merely upon a review of the evidence taken before the commission. Such being the case the trial court is not bound by the rule followed on an appeal by this and by most appellate courts to the effect that, if any reasonable evidence sustains the order of a lower tribunal, an appellate court will not consider and review the weight of the evidence, or the inferences drawn therefrom by the trial court. The superior court in this proceeding had the right to form its own judgment as an independent tribunal as to the conclusion to be drawn from the evidence, subject only to the rule laid down in section 720, *supra*, that the burden of proof is on the plaintiff to show by clear and satisfactory evidence that the order of the commission is unreasonable or unlawful."

There is nothing unusual about a *judicial* inquiry into the issue as to whether rates prescribed by the Commission are "unreasonable and unjust." At common law the issue as to whether the rates, rules or practices of a carrier or other public service corporation were unreasonable or unjust was tried in the courts every day as an issue of fact.

"Yet it has always been recognized that, if a carrier attempted to charge a shipper an unreasonable sum, the courts had jurisdiction to inquire into that matter and to award to the shipper any amount exacted from him in excess of a reasonable rate; and also in a reverse case to render judgment in favor of the carrier for the amount found to be a reasonable charge. The province of the courts is not

changed, nor the limit of judicial inquiry altered because the legislature instead of the carrier prescribes the rates." *Reagan v. Farmers' Loan and Trust Co.*, 154 U. S. 362, 397.

See also *Railroad Commission v. H. & T. C. R. Co.*, 90 Texas 340, 353, 354.

At common law, carriers and other public service corporations fixed their own rates. *Int. Com. Comm. v. B. & O. R. R. Co.*, 146 U. S. 263, 275. It was unlawful for them to charge an "unreasonable and unjust" rate; the exaction of such a rate was a tort. *Lewis v. Southern Pacific Co.*, 283 U. S. 654, 660. For this tort, the remedy of the shipper, customer or other aggrieved person was to file an ordinary civil suit for damages. *Arizona Grocery Co. v. Atchison, etc. R. Co.*, 284 U. S. 370, 383. In such a suit the question as to whether the rate was unreasonable and unjust so as to entitle the shipper or customer to "reparations" or damages was tried by the court in which the suit was filed as an issue of fact. In general, rates are now fixed by regulatory authority. And when a rate is fixed the carrier may exact it and the customer must pay it until it is changed by the authority that prescribed it. *Arizona Grocery Co. v. Atchison, etc. R. Co.*, *supra*; *Producers' Refining Co. v. Missouri, K. T. R. Co.* (Com. App.), 13 S. W. (2) 679. But a regulatory authority, such as the Railroad Commission, is not empowered to fix "unreasonable and unjust" rates or charges any more than was a public service corporation authorized at common law to exact such a charge. And

any aggrieved person may bring his action in the designated court *in advance*, and not later, as at common law, to have the issue determined as to whether the prescribed rate is “unreasonable and unjust.” *Arizona Grocery Co. v. Atchison, etc. R. R. Co.*, *supra*; *Producers’ Refining Co. v. Missouri, K. & T. R. Co.*, *supra*. But the issue to be tried and determined remains the same. Whether a rate is unreasonable and unjust is essentially an inquiry of fact. The Legislature evidently intended that the expression “unreasonable and unjust” should be interpreted as at common law. The intent was to prevent the Railroad Commission from doing that which at common law was unlawful.

The correctness of the views here expressed is attested by the decision of this Court in *Railroad Commission v. Weld & Neville*, 96 Texas 394, 405. We quote as follows from the opinion :

“At common law in a proceeding of this kind the terms ‘unreasonable and unjust’ meant that the rate charged *was more than a fair compensation for the services rendered*, or that the difference in rates constituted an unjust discrimination against the complainant.” (Our italics.)

(4) *To allow an independent judicial review will not amount to a substitution of the judgment of the court for that of the Commission.*

The Honorable Court of Civil Appeals in its opinion repeatedly states, in effect, that to allow a full, independent judicial review of a rate order would

be to transfer to the reviewing court "the legislative function of rate making" and would permit the reviewing court "to substitute its judgment for that of the trained and experienced experts whom the law has provided for that purpose." (Concurring Memorandum Opinion, 13.)

Here the Court ignores the distinction between the two inquiries—the legislative inquiry conducted by the Commission, and the *judicial* inquiry conducted by the reviewing court—as well as the difference in the standards applied in each. The Court has ignored the distinction between the inquiry that is made *before* a rate is fixed with the view of determining what rate should be fixed for application in the future, and the inquiry that must be made *after* a rate is fixed and the actual and *later* application of the rate is challenged on the ground of confiscation.

The fixing of a rate is a legislative act and results from a legislative inquiry wherein only *legislative* factors are involved and *legislative* standards applied. The Railroad Commission of Texas has no power to determine the issue of confiscation of property rights. In fact, that issue cannot even arise until after the *legislative* action of the Commission is complete and its legislative act—the promulgated rate—is later applied to the property or business of the complaining party. How the rate actually applies after it has been promulgated under *legislative* standards presents a *judicial* question to be determined under *judicial* standards only.

The two inquiries—the one conducted by the Commission before promulgating a rate and the one conducted by the court concerning the application of the rate—are fundamentally different; different factors are to be considered and are controlling. The legislative finding that a rate is a reasonable and just rate does not amount to a judicial finding that it is nonconfiscatory in its actual application to the property of a particular individual. The fact that the reviewing court, applying judicial standards—standards that the Commission is not empowered to apply at all—may find that the rate is unreasonable, unjust and confiscatory does not mean that the reviewing court has substituted its finding or its discretion for that of the Commission. This would be true only if the reviewing court had the power to revise the Commission's action and to substitute a different rate for the rate fixed by the Commission; that is, only if the reviewing court was permitted to participate in the legislative process, as is the case in *Oklahoma (Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290)*; and in *Virginia (Prentis v. Atlantic Coast Line Co., 211 U. S. 219)*.

In *Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 226*, the Court, discussing the distinction between the *legislative* inquiry conducted by the rate-making authority and the *subsequent judicial* inquiry conducted by the reviewing court, said:

“But we think it equally plain that the proceedings drawn in question here are legislative in their nature, and none the less so that they have taken

place with a body which at another moment, or in its principal or dominant aspect, is a court such as is meant by Section 720. A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial in kind * * * .

“Proceedings legislative in nature are not proceedings in a court within the meaning of Rev. Stats. Section 720, no matter what may be the general or dominant character of the body in which they may take place. (Citing cases.) That question depends not upon the character of the body but upon the character of the proceedings. * * * And it does not matter what inquiries may have been made as a preliminary to the legislative act. Most legislation is preceded by hearings and investigations. But the effect of the inquiry, and of the decision upon it, is determined by the nature of the act to which the inquiry and decision lead up. * * * The nature of the final act determines the nature of the previous inquiry. * * * So when the final act is legislative the decision which induces it cannot be judicial in the practical sense, although the questions considered might be the same that would arise in the trial of a case.”

The Commission has no more power to determine the judicial question of confiscation of property rights after the Commission's legislative work has been completed than has a reviewing court to deter-

mine the legislative question committed solely to the Commission. Whether a rate is confiscatory cannot be determined under legislative standards; it is determinable only under judicial standards and only by a court.

The language of this statute should be interpreted in the light of the fact that it defines a judicial duty to be performed by a court acting as a *court* and under judicial tests or standards. The statute devolves upon the reviewing court the duty of determining whether the rate, already legislatively fixed, is "*unreasonable and unjust* to it or them." In making this determination the reviewing court, of necessity, must apply *judicial* standards, as distinguished from *legislative* standards that the Commission is free to apply. In other words, in determining whether the prescribed rate is "unreasonable and unjust" it must function as a court. The question as to whether a rate is unjust and unreasonable is determined "by the same rules that would be applied in determining a like question between other parties." *Railroad Commission v. Weld & Neville*, 96 Texas 394, 403—that is, in the same way as is determined in any civil suit the issue as to whether a given act or action is unreasonable and unjust. As we have previously pointed out, such issue was determined at common law before the enactment of statutes authorizing the regulating and fixing of rates in civil suits brought by the shipper or customer claiming that he had been over-charged or had suffered discrimination. In *Railroad Commission v. Weld & Neville*, 96 Texas 394, 405, the Court said:

“At common law in a proceeding of this kind the terms ‘unreasonable and unjust’ meant that the rate charged was *more than a fair compensation for the services rendered*, or that the difference in rates constituted an unjust discrimination against the complainant.” (Our italics.)

We submit that the Legislature, in devolving upon the reviewing court the duty to determine under judicial standards whether the Commission’s rate, already fixed under legislative standards, is “unreasonable and unjust,” must have intended that the judicial inquiry should be conducted in the same way as other judicial inquiries involving the issue as to whether a given act or action is unreasonable and unjust. In the conduct of such a judicial inquiry the court must be vested with the power to weigh the evidence showing how the rate actually applies as against the property and business of the complaining utility. It must be empowered to determine the issue of *confiscation of property rights*—an issue that the Commission is not empowered to determine and in fact does not determine at all.

Whether a given rate is “unreasonable and unjust,” tested by judicial standards, depends upon the facts; such an inquiry is essentially one of fact and the judicial tribunal conducting it must be empowered to weigh the evidence and in that connection to determine the credibility of witnesses. It must have the same power that it would exercise in any other inquiry of a judicial nature involving the same issue as to whether certain action is “unreasonable and unjust.”

(5) *Article 6059, as construed by the Court of Civil Appeals, does not afford adequate judicial review of the challenged rate order, as is required under the decisions of the Supreme Court of the United States.*

The Court of Civil Appeals has so construed Article 6059 as to lead to the result that adequate judicial review of the rate order, challenged on constitutional grounds, is not afforded by the statute. For that reason the Court's construction should be rejected; especially in view of the fact that the Court's construction is supported by nothing except mere implication. The "substantial evidence" test is in no way referred to by the statute. The statute contains no language sufficient to put the Court under the compulsion of adopting a construction that renders the statute unconstitutional.

The Supreme Court of the United States has many times held that adequate judicial review of such orders must be provided and that such review requires that after the rate has been legislatively fixed and a reviewing court is called upon to judicially determine whether in actual application the rate will confiscate the plaintiff's property, it must be empowered to pass its independent judgment on the facts, as well as the law, touching the *constitutional* issue of confiscation. The rule is thus stated in *Ohio Valley Water Company v. Ben Avon Borough*, 253 U. S. 287:

"The order here involved prescribed a complete schedule of maximum future rates and was legisla-

tive in character. * * * *In all such cases, if the owner claims confiscation of his property will result, the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, 14th Amendment.*" (At p. 289; our italics.)

This case has been recently approved and followed by the Supreme Court in *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 50-52. That case points out the distinction between the findings of a rate-making body relating to its *jurisdiction* and its findings relating to the *merits* of the inquiry. *It points out the distinction between the "scope of judicial review" in a case where it is claimed that the rate is confiscatory and another case where it is claimed merely that the rate order is not supported by "substantial evidence."* That distinction applies as between a suit that involves only the *statutory* ground that the rate is "unreasonable and unjust" and a suit, like the instant one, that involves the *constitutional* ground that the rate is confiscatory in its application to the property and business of the complainant. As we have pointed out in our Statement of the Case (*supra*, pp. 3-5), this suit involves the broader constitutional issue of confiscation. It was submitted to the jury under a charge that submitted the issue of *confiscation* of property; the jury was required, before finding for the complainant on the special issues submitted, to find that the prescribed rate would not yield a fair return on the fair value of the company's prop-

erty. The facts so found established as a matter of law that the rate was confiscatory; the Supreme Court of the United States has so held. (*Lone Star Gas Co. v. Texas*, 304 U. S. 224, 231; opinion quoted, *supra*, p. 4.)

The Supreme Court of the United States in the *St. Joseph Stock Yard Company* case affirms that a rate-making body, even the Legislature itself, has no *jurisdiction* to fix a confiscatory rate. When a rate is challenged as *confiscatory* the issue raised is one of power or *jurisdiction*. When this jurisdictional issue is raised the findings of the rate-making authority, though sustained by substantial evidence, are not conclusive upon the reviewing court. The reviewing court must act independently in determining this *jurisdictional* issue and must pass its independent judgment upon the facts as well as the law.

On the other hand, if it is conceded or determined that the rate-making body has jurisdiction, no issue of *confiscation* being involved, then there is another limitation on its authority: In fixing a rate, *even a reasonable rate*, it must follow the evidence. If a rate order is not sustained by *any substantial evidence* it will be set aside when brought under judicial review. Rate orders, like other orders of an administrative body, will be set aside if they are not sustained by substantial evidence. *New England Divisions Case*, 261 U. S. 184, 203. And in exercising this power of judicial review the reviewing court will approve the findings of the administrative body

relating to the *merits* of the inquiry, as distinguished from its *jurisdiction*, if they are sustained by substantial evidence.

In respect to the distinction here mentioned the Supreme Court, speaking through Chief Justice Hughes, in the *St. Joseph Stock Yards Company* case, said:

“In determining the *scope of judicial review* of that act, there is a distinction between action within the sphere of legislative authority and action which transcends the limits of legislative powers.” (298 U. S. 50; our italics.)

Then, discussing the second class of cases—cases in which confiscation was claimed and where, therefore, the action of the Commission “transcends the limits of legislative power”—the Court said:

“But the Constitution fixes limits to the rate-making power by prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation. When the legislature acts directly, its action is subject to judicial scrutiny and determination in order to prevent the transgression of these limits of power. The legislature cannot preclude that scrutiny of determination by any declaration or legislative finding. *Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained.* Nor can the legislature escape the constitutional

limitation by authorizing its agent to make findings that the agent has kept within that limitation. Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded. It is said that we can retain judicial authority to examine *the weight of evidence* when the question concerns the right of personal liberty. But if this be so, it is not because we are privileged to perform our judicial duty in that case and for reasons of convenience to disregard it in others. The principle applies when rights either of person or of property are protected by constitutional restrictions. Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority. This is the purport of the decisions above cited with respect to the exercise of an *independent judicial judgment* upon the facts where confiscation is alleged." (298 U. S. 51-52; our italics.)

On the other hand, as applied to cases where the action of the Commission was "within the sphere of legislative authority," and it was claimed merely

that the Commission did not hear sufficient evidence, the Court announced the rule as follows:

“In such cases, the judicial inquiry into the facts goes no further than to ascertain whether there is evidence to support the findings, and the question of the weight of the evidence in determining issues of fact lies with the legislative agency acting within its statutory authority.” (298 U. S. 51.)

Under the rule thus clearly laid down, a reviewing court in considering whether a rate is confiscatory must apply its independent judgment to the facts unhampered by the commission's findings, even though sustained by substantial evidence. On the other hand, where a rate is not challenged as being confiscatory, but only as not being sustained by evidence, the reviewing court will sustain the findings of the commission if they are sustained by “substantial evidence.” In doing this, it holds the commission to the *legislative* limit on the exercise of its powers, that is, the limit which requires it to base its rate orders on sufficient evidence even where it is not “transcending the limits of legislative power” by promulgating a confiscatory rate. Where the issue raised is only the statutory one—that is, the claim that the rate is “unreasonable and unjust”—then the reviewing court will sustain the findings of the Commission. It may be assumed that the Legislature might provide in such a statute as Article 6059 for the more limited scope of review here referred to in determining the statutory issue as to whether a rate is unreasonable and unjust. The decisions of this Court heretofore reviewed hold that

this more limited scope of review has not been established by the Legislature even where only the statutory grounds of attack are raised.

Mr. Justice Holmes, in *Railway Co. v. Osborne*, 265 U. S. 14, said:

“When such a charge as the present one is made it can be tried fully and fairly only by a court that can hear any and all competent evidence and that is not bound by findings of the *implicated* board for which there is any evidence, *always easily produced*.” (Our italics.)

The “implicated board” can always easily produce enough evidence to create a conflict. It can do this even if it produces only witnesses whose qualifications as experts are questioned and whose credibility is assailed. And if the creating of this kind of conflict destroys the power of the reviewing court to give relief against the rate order, then the judicial review thus provided is obviously inadequate under any conceivable rule, however liberal.

Litigations rarely involve undisputed facts. Most often the very occasion for going into court is a dispute about the facts, and a court that has no power to settle a dispute about the facts is not a court at all. The settling of the factual problems raised by the evidence is an essential of any governmental agency that is justly called a court.

A decision in favor of the Commission merely because the evidence is conflicting is no decision of the

case at all. It is simply an announcement of judicial impotence imposed on the court by the Legislature, in violation of the Constitution. Article 6059, as thus construed, provides a purported mode of judicial review that is in fact no *judicial* review at all. Certainly this is true where the complaining party raises the constitutional issue that his property is being threatened with confiscation, in violation of the State and National Constitutions. *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 50-52; *Crowell v. Benson*, 285 U. S. 22, 56.

(6) *Wholly apart from Federal rules and decisions, Article 6059, as construed by the Court of Civil Appeals, is unconstitutional under the State Constitution. Under the State Constitution, the Railroad Commission, an administrative body, may not be empowered to try and determine conclusively all issues of fact as to whether the property of the citizen is being confiscated by its rate orders, leaving the complaining party no relief in the court except in respect to questions of law.*

The Court of Civil Appeals, in its first opinion as well as its "Concurring Memorandum" opinion, reviews at length the decisions of the Supreme Court of the United States in respect to the kind and scope of judicial review that the State procedure must provide in respect to rate orders. It enters upon a lengthy discussion of the views of individual Judges of the Supreme Court as indicated in various opinions and dissenting opinions; and also discusses at

length magazine articles in some instances criticising these opinions.

We deem it wholly unnecessary to follow the Court into the details of this discussion. The opinions of the Supreme Court speak for themselves. We now submit that, wholly apart from the Federal rule and the Federal decisions expounding and applying it, Article 6059, as construed by the Court of Civil Appeals, is unconstitutional under the State Constitution because, as thus construed, it devolves upon the Railroad Commission, an administrative, executive body of officers, powers purely judicial in nature. The statute thus construed falls within *Board of Water Engineers v. McKnight*, 111 Texas 82. Hence, such construction, not being required by the language of the statute, should not be adopted.

As we have before pointed out, the issue of confiscation arises only after the legislative action of the Commission is complete. The issue of confiscation can and does involve an inquiry into the actual application of the rate after it has been promulgated to the property and business of the complaining party. Such an inquiry is purely judicial in nature. The tribunal that conducts it must be a judicial tribunal. The power to conduct it and to determine the issues raised in it may not be devolved upon a tribunal not judicial in nature.

The Company has raised in this suit the issue that this rate, in its actual application to its property and business, is confiscatory. Whenever that is-

sue is raised as against the validity of any legislative act, of whatsoever character, in respect to its actual application to the complaining party's business or property, the court must be vested with the independent power to inquire into the *facts* touching the order in its actual application. To give the Commission the power to determine the issue of confiscation of property rights in the first instance, leaving to the court only limited power to pass upon the question of *law* as to whether the Commission's finding on the issue of confiscation is sustained by "substantial evidence," the court having no power to independently consider the facts, is to invest the Commission with powers inhibited by the State Constitution. *Board of Water Engineers v. McKnight*, 111 Texas 82, 93. To give the Commission such power would give it the power to participate in the judicial process of determining the judicial question of confiscation. And to give the court only such limited power to determine questions of *law* in such a case would deprive it of its constitutional power to function as a court and, as such, to determine questions of fact, as well as of law. Stated otherwise: To confer on the Commission the power to conclusively determine the *facts* in a suit involving the issue of confiscation of property, leaving to the reviewing court only the power to determine questions of law, is to permit the Commission to participate in the judicial process of trying the tendered issue of confiscation.

Whether the property of the complaining party is being confiscated involves an inquiry into the facts.

Legal questions properly cannot rise until the questions of fact have been settled. And questions of fact may not properly be settled except under the application of judicial standards. Hence the tribunal, of whatsoever name, that is given the power to conclusively determine the facts touching the tendered claim of confiscation is judicial in character; the powers it exercises are judicial in nature.

Furthermore, if the Legislature would impose on a court the duty to function as a court and to determine on its *merits* the constitutional issue of confiscation of property rights, it must give the court the full power to function as a court and, therefore, the power to determine the issues of fact, as well as of law, independently and on their merits. In *Crowell v. Benson*, 285 U. S. 22, 57, the Supreme Court of the United States, in a case arising under a Federal statute that attempted to thus limit the power of a court when called upon to function as a court in determining constitutional issues, declared that recognition of a contrary rule "would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law."

The statute, thus construed, unconstitutionally invades the exclusive domain of judicial power and denies the right of jury trial, in violation of applicable provisions of the State Constitution. It is a

plain invasion of the constitutional independence of the judiciary for the Legislature to affirm that, where evidence is conflicting, the issue of fact in question must be decided in a given way. This amounts to a legislative, as distinguished from a judicial, decision.

The same applies to the holding of the Court that the plaintiff in such a case must establish his right to recover *as a matter of law*. No such rule of decision can be validly laid down as a guide for judicial action. A court, acting as a *court* in performing the duty of determining *originally* and on its *merits* a given inquiry of fact, must be able to examine the facts and to resolve conflicts in the evidence and to give relief according to the justice of the case. A court, being required to determine the issue on its merits, may not validly be required to render judgment against a party merely because he fails to establish his right to recover by uncontradicted evidence as a matter of law. Judicial decision presupposes the possibility, even the probability, of conflicting evidence and the power to resolve the conflict.

Fifth Assignment of Error.

The Court of Civil Appeals, having held that under the law of this State the scope of judicial review of the rate order in question, challenged by the defendant upon the ground that, in its application to defendant's properties, it was confiscatory, involved only a legal inquiry as to whether the rate order was

sustained by substantial evidence, without any power in the reviewing court to determine the credibility of witnesses and to weigh the evidence and settle the conflicts therein, erred in further holding that such a limited judicial review affords the defendant an adequate judicial review and due process of law complying with the requirements of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States; and, having thus held that, under the law of Texas, the scope of judicial review is thus limited, the Court of Civil Appeals erred in failing to hold that said rate order, in the circumstances, could not be enforced against the defendant because of the failure of the State law to afford the defendant adequate judicial review and judicial determination of the duly tendered issue of confiscation, as required by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

First Proposition Under Fifth Assignment of Error.

Applicable decisions of the Supreme Court of the United States hold that where such a rate order is challenged as being confiscatory, the State law must provide a judicial tribunal properly empowered to independently determine the tendered issue of confiscation under the application of judicial standards and uncontrolled by the prior findings of the rate-making authority. The reviewing court must be empowered to pass its independent judgment on the

facts as well as the law. Adequate judicial review is not afforded where the reviewing court is required to sustain the order merely because there may be "substantial evidence" supporting the action of the rate-making authority.

Statement

We adopt here the Statement presented under Assignments of Error One to Four, inclusive, pp. 27-29, *supra*.

See eighth and ninth grounds of the Motion for Rehearing; also the first ground of the Supplemental Motion for Rehearing.

Authorities

Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287;

St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 50-52, and the authorities cited on page 49;

Bluefield Water Co. v. Public Service Commission, 262 U. S. 679, 689;

Crowell v. Benson, 285 U. S. 22.

United Railways Co. v. West, 280 U. S. 234, 251.

Argument.

We adopt without repetition our discussion of the same proposition and the cases heretofore presented, *ante*, pp. 60-67.

It is respectfully submitted that the holding of the Court of Civil Appeals in this connection is in conflict with the holding of the Supreme Court of the United States in *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 51-52, and *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287. These cases and other cases hold definitely and clearly that the reviewing court must be vested with adequate power to independently consider the facts as well as the law and to settle the credibility of witnesses and the conflicts in the evidence; otherwise, there is a denial of adequate judicial review of a challenged rate order, in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. These cases definitely and clearly hold that if the power of the reviewing court be confined simply to the legal issue of determining whether there is substantial evidence sustaining the challenged rate order, then adequate judicial review is denied.

These decisions of the Supreme Court of the United States are fully discussed in the "Concurring Memorandum" opinion filed by the Court of Civil Appeals. As we understand the position taken by the Court, it does not contend or hold that these cases are not in point. To the contrary, the Court apparently concedes that these cases pointedly sustain our contention. And the Court refuses to follow and apply these cases only because, in the view of the Court, they do not represent the present attitude of the present personnel of the Supreme Court of the United States.

In discussing the *St. Joseph Stock Yards Company* case and the *Ben Avon Borough* case the Court of Civil Appeals quotes from an opinion of the Supreme Court of Wisconsin and at length from a public address made by the Chief Justice of that court in the course of which he criticises the opinion in the *Ben Avon Borough* case as well as the opinion in *Crowell v. Benson*, *supra*.

We respectfully submit that a state court, called upon to decide a question of Federal constitutional law, should accept these decisions at their face value, leaving to the Supreme Court of the United States the duty of determining whether they were correctly decided or whether they should now be followed as controlling precedents under the doctrine of *stare decisis*. Whether these decisions should be overruled should be left to the determination of the Supreme Court itself. Up to date they have not been overruled by that Court. And that fact should be enough to require any state court to accept as correct the rule they announce.

Sixth Assignment of Error.

The Court of Civil Appeals erred in holding that the District Court erred in excluding from evidence upon the trial of this case the record of the evidence heard by the Railroad Commission. This holding is in substantial conflict with the prior holding of the same Court of Civil Appeals in this case upon its first review of the case, as witness the statement at

page 499 of 86 S. W. (2d). It is also in conflict with the opinion of the same Court of Civil Appeals in *Railroad Commission v. Rau*, 45 S. W. (2d) 413; and with the holding of the same Court in *State v. St. Louis Southwestern Railway Co. (the Hillsboro Depot case)*, 165 S. W. 491, 499 (on rehearing).

(Submitted as a Proposition.)

Seventh Assignment of Error.

The Court of Civil Appeals erred in failing to hold that the trial in the District Court of Travis County in a case like this is essentially a trial *de novo* wherein the issue is whether upon the evidence heard in the District Court the rate order assailed is shown by "clear and satisfactory evidence" to be "unreasonable and unjust," or confiscatory.

(Submitted as a Proposition.)

First Additional Proposition Under Sixth and Seventh Assignments of Error.

The statute from which Article 6059 was fashioned (Article 6453) has been in force for more than fifty years and has always been construed by the District Court of Travis County when called upon to apply it, as well as by the appellate courts of the State, as authorizing a trial *de novo*, wherein the issue is whether upon the evidence heard *anew* in the Dis-

strict Court the rate order or other challenged action of the Commission is shown by "clear and satisfactory evidence" to be unreasonable and unjust or confiscatory. The opinion of the Court of Civil Appeals puts upon the statute a new construction in conflict with the settled construction that has been applied to the parent statute for nearly fifty years.

Statement.

See the First and Second grounds of the Motion for Rehearing filed in the Court of Civil Appeals.

Argument.

In *Railroad Commission v. Rau*, 45 S. W. (2d) 413, 415, the Court of Civil Appeals, speaking through Chief Justice McClendon, said:

"Appellants contend that the transcript of the record in the railroad commission hearing was improperly excluded on the ground that the proceeding provided for in section 17 of the act is merely a review of the correctness of the order of the commission based upon the record before it. This contention is supported by a number of citations from other states, the statutes of which are different from our own, which provides that the proceeding 'shall be tried and determined as other civil causes in said court.' Similar provisions appear in R. S. arts. 6059 and 6453, giving the right of appeal to the courts from orders of the railroad commission in other matters; and the holding has been, wherever the question

has arisen, that the proceeding in the district court is a trial de novo, and not merely a review of the railroad commission's action upon the record made before the commission. Each party is permitted to introduce such evidence as is pertinent to the controversy, regardless of whether it had been introduced before the commission, as in all other de novo trials." (Our italics.)

In *St. v. St. Louis Southwestern Ry. Co. of Texas*, 165 S. W. 491, 499, the same Court of Civil Appeals, upon rehearing, said:

"We did not mean to say that we were called upon to review the evidence adduced before the commission. We have no knowledge as to what such evidence was. The only testimony in the record is that given in the district court upon the trial of this case, and upon such trial it would not have been permissible to prove what was testified to before the Railroad Commission, *except by way of impeaching a witness.*" (Our italics.)

Upon its first review of this case the Court of Civil Appeals in effect approved the action of the trial court in excluding the Railroad Commission record. In its opinion the Court said:

"As regards the statutory appeal authorized by article 6059, to determine whether a rate order is unreasonable and unjust, it is manifest that the Legislature intended for the trial on appeal to be de novo and upon new or additional evidence pertinent to the issue, because the complainant is required to show by clear and satisfactory evidence that such rate is unreasonable and unjust as to it."

In the same opinion the Court further held that the question of "whether the rate is confiscatory or unreasonable and unjust have been held to be legal or justiciable questions of fact, and as to which the wider scope of judicial appellate review seems to have been adopted by the Legislature and courts of this state."

The Supreme Court of the United States interpreted the first opinion of the Court of Civil Appeals as holding that such a trial is "entirely *de novo*." The Supreme Court said:

"The trial on the merits, before a jury, was begun on June 11, 1934, and was entirely *de novo*." (304 U. S. 224, 228.)

The Hillsboro depot case (165 S. W. 49) was decided in 1913. In that case, the Court stated that upon the trial *de novo* in the District Court "it would not have been permissible to prove what was testified to before the Railroad Commission except by way of impeaching a witness. During the intervening twenty-five years a large number of cases brought against the Railroad Commission have been tried in the district courts of Travis County, and it is a matter of common knowledge that the statement made in the Hillsboro depot case has been accepted by the reviewing courts as correctly defining, in an authoritative way, the applicable rule of procedure. Hence, the reviewing court designated in the statute has consistently applied the rule there announced and

has limited the trial to the evidence heard *de novo* in the District Court.

There was a subsequent trial of the Hillsboro depot case (199 S. W. 829). It does not expressly appear from the opinion of the Court of Civil Appeals on the second appeal that the second trial was based upon the evidence heard *de novo* in the District Court, as distinguished from the record made before the Railroad Commission, but it should be presumed that on that point the District Court followed the direction given to it by the Court of Civil Appeals. Upon the second trial the jury found the order to be "unreasonable and unjust" and, upon this verdict, judgment was entered setting aside the order. No appeal was taken. Thereafter the Railroad Commission made another order, again requiring the construction of a union depot at Hillsboro, and a second suit was brought by the railroad companies to enjoin the enforcement of the order as being "unreasonable and unjust." Upon this issue the railroad companies prevailed in a jury trial. The Court of Civil Appeals reversed this judgment and rendered judgment for the Commission (*State v. St. Louis Southwestern R. Co.*, 199 S. W. 829.) Upon writ of error, the Commission of Appeals held that the issue as to whether the order of the Commission was "unreasonable and unjust was one of fact, and not of law"; and further, that, "The Court of Civil Appeals was without authority to substitute its finding on this issue for that of the jury." (255 S. W. 390, 391.) If the issue is one of fact, and not of law, as held by the Commission of Ap-

peals, then, as an issue of fact it should be tried *de novo* in the reviewing court.

The holding of the Court of Civil Appeals in this case is in obvious conflict with its prior holding in the Hillsboro depot case and with that of the Commission of Appeals in the same case.

Eighth Assignment of Error.

The Court of Civil Appeals erred in failing to hold that the action of the District Court in excluding from evidence the record made before the Railroad Commission was at most only harmless error.

Ninth Assignment of Error.

The Court of Civil Appeals erred in holding that the Railroad Commission was "denied the right to refute the attack by the very evidence upon which it based its rate order."

Statement

1. See the Twenty-ninth and Thirtieth grounds of the Motion for Rehearing filed in the Court of Civil Appeals.

2. The Railroad Commission record was exclud-

ed from evidence in the District Court and was brought up to the Court of Civil Appeals as a part of the bill of exceptions complaining of its exclusion.

Argument.

The error, if any, committed by the District Court in excluding the Railroad Commission record was at most only harmless error. The Railroad Commission was not denied the right to offer the same evidence at the trial that was heard by it before it promulgated its order. It was merely denied the right to introduce the *written transcript of this evidence*; it was not denied the right to place the same witnesses on the stand and adduce from them the same evidence.

There is no claim that the plaintiffs were prejudiced by being required to offer their evidence *de novo* in the District Court instead of being permitted to submit the evidence in written form as adduced before the Railroad Commission; there is no claim that they were denied a full and fair opportunity to offer any and all evidence they wished to offer, including any and all of the evidence offered by them before the Railroad Commission. There is no showing in the record that they were prejudiced in any way by being required to produce their witnesses before the court and jury and offer their evidence *de novo* instead of offering it in written form. In-

deed, it does not appear and is not even contended that the railroad Commission would have been content to have this case tried simply on the written evidence given before the Railroad Commission.

Upon the trial in the District Court, plaintiffs objected to the introduction in evidence of any of the proceedings before the Commission excepting only the Commission's order. They objected even to the introduction of the Commission's opinion setting out its findings upon the ground that:

"This is a trial de novo and the opinion of the Commission is not binding on the court, defendant or plaintiffs. This procedure is not like it is in many states, or we would want it in evidence." (Objection of counsel for plaintiffs to introduction of Commission's findings, Typewritten, S. F., 26.)

We further quote an objection made by counsel for plaintiffs:

"We object to any inclusion in the Exhibit or showing made as to Rate Base as set out in findings by the Railroad Commission, and the amount shown as rate of return based on that rate base, because that is simply an argument assuming as basic at that time the findings of the Railroad Commission, which are not binding in this procedure, which is a hearing de novo. * * * " (I, R. 326).

II.

THE COURT OF CIVIL APPEALS FAILED TO GIVE PROPER EFFECT TO THE JUDGMENT, OPINION AND MANDATE OF THE SUPREME COURT OF THE UNITED STATES.

Tenth Assignment of Error.

The Court of Civil Appeals erred in holding that the findings and conclusions of the Supreme Court of the United States left said Court of Civil Appeals free to review the entire over-all evidence with the view of determining whether it was sufficient in law or in fact to sustain the judgment of the District Court declaring the rate order in question to be confiscatory.

Eleventh Assignment of Error.

The Court of Civil Appeals erred in holding, in effect, that, notwithstanding the proceedings had in the Supreme Court of the United States and the mandate issued by that Court to the Court of Civil Appeals, it was entitled to again make the same ruling that it made before—that is, a ruling that the over-all evidence was insufficient as a matter of law to sustain defendant's attack upon the rate order as being confiscatory—by simply assigning new and additional reasons in support of that ruling, in lieu

of the reason previously assigned in its former opinion and condemned by the Supreme Court.

Twelfth Assignment of Error.

The Court of Civil Appeals erred in holding, in effect, that the "further proceedings not inconsistent" with the opinion of the Supreme Court involved the right and authority on the part of the Court of Civil Appeals to again render judgment holding and adjudging that defendant's over-all evidence was insufficient as a matter of law to sustain its attack upon the rate order as being confiscatory and in violation of rights vouchsafed to it by the Fourteenth Amendment to the Constitution of the United States; that is, the right to again make the same ruling that it made on its first review of the case.

Thirteenth Assignment of Error.

Inasmuch as the judgment and opinion of the Supreme Court of the United States (304 U. S. 224-242) necessarily import a holding by that Court that the over-all evidence if accepted by the triers of fact was sufficient in law to support a finding that the challenged rate order was confiscatory, and therefore invalid under the Fourteenth Amendment to the Constitution of the United States, the Court of Civil Appeals erred in now holding that the same evidence is insufficient as a matter of law to sustain defendant's attack upon the rate order.

First Proposition Under Assignments of Error Ten to Thirteen.

The Supreme Court of the United States reversed the judgment of the Court of Civil Appeals, not because the latter failed to make findings on the "over-all" evidence, but because the Court of Civil Appeals set aside the findings made by the "triers of fact" in the District Court by applying to the over-all evidence sustaining such findings an "untenable standard of proof" or test in determining its sufficiency. It was the condemnation by the Court of Civil Appeals of the over-all evidence as being insufficient as a matter of law, and not the reasons assigned for such condemnation in the opinion of the Court of Civil Appeals, that was disapproved by the Supreme Court.

Second Proposition Under Assignments of Error Ten to Thirteen.

The Court of Civil Appeals on the first review of this case ruled that defendant's "over-all" evidence did not constitute the required "quantum and character of proof necessary to establish the invalidity of the rate as being confiscatory." The Supreme Court of the United States reversed that ruling and thereby held that defendant's over-all evidence did constitute the "quantum and character of proof necessary to establish the invalidity of the rate as being confiscatory." The reasons assigned by the Court of Civil Appeals in support of its ruling that said over-

all evidence was *legally* insufficient are not material; the Supreme Court of the United States was reviewing the *ruling* made by the Court of Civil Appeals, and not merely the *reasons* assigned in its support.

Third Proposition Under Assignments of Error Ten to Thirteen.

If the Supreme Court of the United States had believed that defendant in relying upon its over-all evidence "did not adduce the quantum and character of proof necessary to establish the invalidity of the rate as being confiscatory," as was held by the Court of Civil Appeals, it would have affirmed the *ruling* made by that Court, even if it had believed that the *reasons* assigned in support of the ruling were wrong; thus following the rule governing appellate review generally accepted by all courts.

Fourth Proposition Under Assignments of Error Ten to Thirteen.

When the Supreme Court of the United States reversed the ruling of the Court of Civil Appeals to the effect that defendant's over-all evidence was insufficient as a matter of law it necessarily held that the over-all evidence was *not* insufficient as a matter of law. Otherwise, it reversed the judgment of the Court of Civil Appeals on an immaterial ground.

An adjudication that a given ruling constitutes

error necessarily involves an adjudication that every reason assigned or assignable in support of the ruling as not constituting error is insufficient. This is because of the fact that appellate courts review *judgments* and *rulings*, and not merely the *reasons* assigned in their support.

Fifth Proposition Under Assignments of Error Ten to Thirteen.

All of the plaintiffs' objections to the legal sufficiency of the over-all evidence, including the objection now relied upon and sustained by the Court of Civil Appeals, were duly presented in the Supreme Court of the United States and were presumptively considered and overruled by that Court, whether discussed in its opinion or not. The scope of the Court's *decision* is not limited to the matters or reasons discussed in its opinion. Furthermore, the opinion of the Supreme Court expressly shows that it held that defendant's over-all evidence was sufficient to sustain a finding that the rate was confiscatory.

Statement and Argument

1. See thirteenth, sixteenth, eighteenth and nineteenth grounds of the Motion for Rehearing.
2. The Court of Civil Appeals upon its first review of the case held that defendant's over-all evidence was insufficient as a matter of law; that it

was insufficient "in quantum and character * * * to establish the invalidity of the rate as being confiscatory." (86 S. W. (2d) 502, col. 2, L. 1.) As one of the reasons supporting this ruling the Court of Civil Appeals declared that a segregation as between defendant's interstate and intrastate properties and operations was necessary and that this segregation had not been properly made. Defendant then took an appeal from this ruling and the judgment that followed it, but not from the reasons assigned in its support. On this appeal the Supreme Court of the United States disapproved the *ruling*, and not merely the assigned *reasons*.

It was the ruling that the over-all evidence offered "in direct rebuttal of the Commission's findings" and "properly submitted to the jury," was insufficient that was disapproved by the Supreme Court of the United States. The Court's discussion of the segregation question became a part of its opinion only by way of holding or pointing out that one of the reasons assigned by the Court of Civil Appeals in support of its ruling was not sufficient.

The Supreme Court of the United States, in its opinion (*Lone Star Gas Co. v. Texas*, 304 U. S. 224, 240) after stating that the Commission's order was "presumptively valid," held that nevertheless the order and the supporting findings were open to attack, and in that connection said:

"Appellant was entitled to present evidence to *rebut* the Commission's findings of value, operating

expenses, revenues and return upon which the order rested." (Our italics.)

After thus defining defendant's right to *rebut* the Commission's findings, the Court then held that the right had been exercised and that the defendant's over-all evidence was in "direct rebuttal" of the findings. The Court further said:

"Appellant presented *much testimony* and elaborate *statistical data* for that *purpose*, treating its property and business as the Commission had treated them. Appellant claimed that this evidence showed a *far higher value* for its properties than the Commission had allowed and that the rate imposed was confiscatory. The trial court submitted that evidence to the jury, under a *proper instruction* as to the burden of proof resting upon appellant, and the jury found in appellant's favor." (304 U. S. 224, 240 (our italics.)

The Court then points out that the Court of Civil Appeals had reversed the judgment, holding the defendant's evidence insufficient upon the ground that it had failed to make "a proper segregation of interstate and intrastate properties and business." The Court in that connection said:

"Thus, the necessity for that segregation was made the criterion. That is clearly shown both from the court's main opinion and its opinion upon rehearing from which we have quoted. 'Having failed to make a proper segregation of interstate and intrastate properties,' said the court, 'appellee (appellant here) did not adduce the quantum and character of proof necessary to establish the invalidity of the rate

as being confiscatory, or unreasonable and unjust.' ”
(304 U. S. 224, 241.)

After thus stating the ruling of the Court of Civil Appeals, the Supreme Court said:

“We think that this ruling as to the necessity of segregation, and that the *sufficiency* of appellant’s evidence should be determined by that criterion, was erroneous.” (Our italics; 304 U. S. 224, 241.)

The Court further said:

“If the findings of the Commission as to value and other basic elements were to be taken as presumptively correct and appellant could not succeed save by overcoming those determinations by clear and convincing proof, appellant could not be denied the right to introduce evidence as to its property and business as an integrated system and to have the *sufficiency of its evidence* ascertained by the criterion which the Commission had properly used in the same manner in reaching its conclusion as to the Texas rate.” (Our italics; 304 U. S. 224, 241.)

The Supreme Court must have believed that defendant’s over-all evidence was otherwise sufficient. If not, then there was no occasion for any discussion of the correctness of the criterion applied by this Court in testing its sufficiency. The Court was reviewing and condemning not merely the criterion or “standard of proof” but the *result* arrived at in applying the criterion. In fact, the “*criterion*” becomes immaterial only because of the *result* arrived at under its application. The Supreme Court of the

United States has repeatedly held that in these confiscation cases coming up from state courts it sits to review, not methods or "criteria," but *results*. *Los Angeles Gas Corp. v. Railroad Commission*, 289 U. S. 287, 304; *Dayton Power & Light Co. v. Commission*, 292 U. S. 290, 298, 302; *United Gas Public Service Co. v. Texas*, 303 U. S. 123, 144.

The Supreme Court further states that the fact that defendant had attempted an improper segregation could not detract "from the *force of the proof* it had already submitted *in direct rebuttal* of the Commission's findings." (304 U. S. 224, 242.)

If defendant's over-all evidence was merely speculative or conjectural or properly subject to any of the other objections presented by plaintiffs in that Court, then it had no "force" and it could not have amounted to a "direct rebuttal" of the findings. This statement clearly means that defendant's over-all evidence had sufficient force, if accepted by the triers of fact to *rebut* and *overturn* the findings.

The Court further added:

"The effort at segregation came after *voluminous testimony* had been taken which *fully presented* appellant's case with respect to the *value* of its property and the result of its operations as an integrated system and the bearing of this evidence upon the contested rate. This *proof could not be ignored* because of a futile attempt, in response to the State's pressure, to find an alternative ground to support the attack upon the Commission's order.

"The first and *primary* ground remained and the determination of the court of first instance as the trier of the facts that the Commission's rate was confiscatory could not properly be set aside by the application of an untenable standard of proof and in disregard of the *evidence* which had been *appropriately* addressed to the Commission's findings and had been *properly submitted* to the jury." (304 U. S. 224, 242; our italics.)

The Court here holds that the over-all evidence was "appropriately addressed" to the Commission's findings and that it was "properly submitted" to the jury. If this evidence was lacking in "probative value" for any of the reasons upon which the plaintiffs here rely, then it was not "properly submitted" to the jury. A holding that evidence is properly submitted to a jury amounts to a holding that, if credited by the jury, it will be sufficient to support the jury's verdict.

The Court here asserts that the "voluminous testimony" offered by defendants "fully presented" its case in respect to the value of its property and the result of its operations. And then adds that this "proof" could not be ignored because of defendant's futile attempt to find an "alternative ground" to support its attack on the order. This clearly amounts to a statement that the "voluminous testimony" was sufficient to support the attack on the order if accepted by the triers of fact. If the "voluminous testimony," referred to by the Supreme Court, was insufficient as a matter of law for any one or all of the reasons now brought forward by the Court of Civil

Appeals, then it could not have been error to ignore it.

The holding that the strength of the Gas Company's case was in nowise affected by the fact that the "*alternative*" ground of attack on the rate order, based on the "futile" attempt at segregation, was insufficient amounted to a holding that the "primary" ground of attack, based on the over-all evidence, was sufficient. The primary ground of attack having been supported by proof, the alternative ground of attack in law became immaterial. The Court's statement that it was wholly unnecessary to consider the alternative ground of attack necessarily implies that the primary ground of attack had been supported. *Hutcheson v. I. & G. N. Ry Co.*, 102 Texas 471; *Saner-Whiteman Lumber Co. v. T. & N. O. R. R. Co.* (Com. App.), 288 S. W. 127, 129.

That the Court of Civil Appeals has *again* made the same *ruling* that it made on its first review of the case is made obvious by its opinion. On the first appeal it held that defendant's over-all evidence was insufficient as a matter of law to show that the rate was confiscatory. That is the identical ruling made on its second review of the case. The Court in its opinion so interprets its action. On page 7 of its opinion the Court of Civil Appeals states that

" * * * this Court has *again* reached the conclusion that when viewed in the light of the over-all or unsegregated basis and evidence the legislative rate order is valid as a matter of law as against the attacks made upon it * * * ." (Our italics.)

On page 12 of its opinion the Court of Civil Appeals states it has

“*again* reached the conclusion that the over-all evidence substantially sustains the rate order against the attack made upon it.” (Our italics.)

And on page 23 of its opinion the Court states that

“this Court has *again* concluded that the rate order is valid because based upon substantial evidence,—that is, the over-all or unsegregated basis and evidence; * * * .” (Our italics.)

The Court of Civil Appeals now holds, in effect, that the decision of the Supreme Court of the United States was limited to a review of the single *reason* assigned by the Court of Civil Appeals in holding, upon its first review of the case, that the over-all evidence was insufficient as a matter of law to sustain the attack upon the rate order. Why should the Supreme Court review one objection to the sufficiency of the evidence and leave all others unreviewed and undetermined? By proceeding in such a way it would be necessary to have as many appeals to determine the *single* question as to the sufficiency of the evidence as there might be objections to its sufficiency.

The Supreme Court of the United States follows the universally accepted rule of appellate procedure and therefore holds that it sits to review judgments and rulings, and not merely reasons assigned in their support.

In *McClung v. Silliman, v. Wheaton* 598, 603, the Court said:

“The question before an appellate Court is, was the *judgment* correct, not the *ground* on which the judgment professes to proceed.” (Court’s Italics.)

This rule was applied by the Supreme Court in its recent decision in *United Gas Public Service Co. v. Texas* (Laredo case), 303 U. S. 123. In that case the Supreme Court affirmed the judgment of the Court of Civil Appeals as well as that of the District Court upholding a jury verdict finding that the prescribed rate was not confiscatory, but upon different grounds, and in that connection stated that it was necessary for it to distinguish “‘between what was said and what was done,’ between ‘dictum and decision,’ between reasoning and conclusion.”

In that case, as in this, the Supreme Court reviewed the *ruling* made by the State Court—the affirmation of the judgment of the District Court—as distinguished from the *reasons* assigned by the State Court in support of its *ruling*.

If the Supreme Court had believed that defendant, in relying on its over-all evidence without segregation, did not “adduce the quantum and character of proof necessary to establish the invalidity of the rate as being confiscatory,” as held by the State Court, it would have affirmed the ruling made by that Court, even if it had believed that the reasons assigned in its support were wrong, thus following the rule gov-

erning appellate review generally accepted by all courts.

In *Sullivan v. Iron Silver Mining Co.*, 143 U. S. 431, the lower court directed a verdict and its action was upheld on appeal upon the ground that, considering the evidence as a whole, "the court should have directed a verdict, as it did, for the plaintiff, and the only error was in giving a wrong reason for a correct instruction."

In an early and leading case, *Brobst v. Brock*, 10 Wall. 519, 528, the defendant in an ejectment case had three distinct defenses, all of which were upheld in the trial court. Error was assigned to the ruling sustaining one of these defenses. The Court held that it was unnecessary to determine the question thus raised unless it could be demonstrated that the other two defenses were untenable. We quote:

"It is true the defendant set up that he had acquired title under that sale, and, had that been his only defense, it would be necessary to consider whether it was sufficient to extinguish the equity of redemption. But there were several other defenses, two of which the court below ruled sufficient to protect the defendant in his possession. If the ruling was correct, or if either of these defenses was perfect, it matters not what may have been the instruction given to the jury respecting other parts of the case. It would be idle to reverse the judgment and send the case back for a new trial if it be certain that the plaintiff cannot recover in the action."

See also *Wisner v. Brown*, 122 U. S. 214; *Williams v. Norris*, 12 Wheaton 117; *Erwin v. Lowry*, 7 Howard 172; *Atwood v. Weems*, 99 U. S. 183; *Yazoo, etc. R. R. Co. v. Mullins*, 249 U. S. 531; *Dayton Power & Light Co. v. Public Utilities Comm.*, 292 U. S. 290; and *West v. Chesapeake & Potomac Telephone Co.*, 195 U. S. 662, 679.

As a matter of fact, the identical *reasons* assigned in the present opinion in support of the ruling that the over-all evidence was insufficient were assigned in the first opinion of the Court of Civil Appeals. In the first opinion the Court of Civil Appeals, referring to defendant's evidence showing an over-all rate base, said that, at most, "This evidence merely presented the difference of opinion of equally well qualified experts"; and that such conflicting evidence, "in the absence of actual experience under the rate, does not meet the quantum and character of proof necessary to set aside the rate order as being confiscatory. (86 S. W. (2d) 503.)

As to the over-all depreciation allowance claimed by defendant, the Court of Civil Appeals upon its first review of the case said:

"Thus it is shown that the depreciation allowance of appellee's experts is speculative, at war with the actual experience and plainly excessive."

In these and in other portions of its opinions the Court of Civil Appeals passed upon the sufficiency of the over-all evidence and held the same to be in-

sufficient as a matter of law, and in that connection brought forward, among others, practically the same grounds now relied upon by it in determining the same questions.

III.

DEFENDANT DISCHARGED THE BURDEN OF SHOWING BY "CLEAR AND SATISFACTORY EVIDENCE" THAT THE RATE WAS CONFISCATORY.

Fourteenth Assignment of Error.

If, notwithstanding the decision of the Supreme Court of the United States and the mandate issued out of that Court, the Court of Civil Appeals was entitled to again review independently the so-called over-all or unsegregated evidence (being the evidence that includes the defendant company's properties and operations in both Oklahoma and Texas) and was entitled to now render whatever judgment it believed to be proper—even the same judgment that it rendered before—then it is submitted that such over-all evidence is clearly sufficient in law to show in a "clear and satisfactory" way that the challenged rate order is confiscatory; and the Court of Civil Appeals erred in holding the contrary.

(Submitted as a Proposition.)

Fifteenth Assignment of Error.

The Court of Civil Appeals erred in holding that defendant failed to discharge the statutory burden of proving by "clear and satisfactory" evidence that the prescribed rate was unjust, unreasonable and confiscatory in this: The state of the evidence in respect to what constituted the fair value of defendant's properties used and useful in the public service—the rate base—was such as to clearly warrant the triers of fact in the District Court, in finding that such over-all properties had a fair value equal to that claimed by defendant's witnesses, or at least much higher than the value shown in the Commission's findings, and then to consider such higher value in connection with the Commission's findings covering other relevant factors relating to the reasonableness of the prescribed rate, and on the basis of such blending of defendant's evidence relating to the rate base and the Commission's findings covering other relevant matters, to find that the prescribed rate was unjust, unreasonable and confiscatory because not affording the defendant a fair return on the fair value of its properties.

(Submitted as a Proposition.)

Sixteenth Assignment of Error.

The Court of Civil Appeals erred in holding that defendant had failed to discharge the burden of proof devolving upon it to show by "clear and satis-

factory evidence" that the rate order was unreasonable, unjust and confiscatory in this: The state of the evidence in respect to the annual accruals to reserve for depreciation, depletion and amortization was such as to clearly give the "triers of fact" in the District Court the right to accept the over-all evidence relating to these matters offered by the defendant (the plaintiffs offering no evidence whatever in respect to these matters), and then to apply such evidence to the rate base and other relevant factors, as shown in the Commission's own findings, and on the basis of such blending of defendant's over-all evidence and the Commission's findings to find that the prescribed rate would not yield defendant a fair return on the fair value of its property, and was therefore confiscatory.

(Submitted as a Proposition.)

Seventeenth Assignment of Error.

The Court of Civil Appeals erred in holding that defendant had failed to discharge the burden of proving by "clear and satisfactory" evidence that the rate in question was unjust, unreasonable and confiscatory in this: The state of the evidence in respect to what constitutes a fair return on the fair value of defendant's properties, used and useful in the public service, was such as to clearly warrant the triers of fact in the District Court to accept as correct the evidence offered by the defendant on the issue of fair return, and then apply that evidence to

the rate base and other pertinent findings made by the Railroad Commission, and on the basis of such blending of defendant's "fair return" evidence and the Commission's findings to find that the prescribed rate would not yield a fair return on the fair value of defendant's property as shown in the Commission's findings, and that it was therefore confiscatory.

(Submitted as a Proposition.)

Eighteenth Assignment of Error.

The Court of Civil Appeals erred in holding that defendant failed to discharge the statutory burden of proving by "clear and satisfactory evidence" that the prescribed rate was unjust, unreasonable and confiscatory in this: Accepting as correct the rate base found by the Commission as applied to defendant's over-all unsegregated properties—\$46,246,617.63—the state of the evidence in respect to other relevant factors bearing upon the reasonableness of the prescribed rate was such as to clearly entitle the triers of fact in the District Court to apply such evidence to the Commission's own finding as to a proper rate base and on the basis of such blending of the Commission's finding as to a proper rate base and such other evidence to find that the prescribed rate was unjust, unreasonable and confiscatory because not yielding defendant a fair return on the fair value of

its "integrated operating system" as appraised by the Commission itself.

(Submitted as a Proposition.)

Nineteenth Assignment of Error.

The Court of Civil Appeals erred in failing to hold that plaintiffs had discharged the burden of establishing by "clear and satisfactory evidence" that the rate was confiscatory.

(Submitted as a Proposition.)

First Additional Proposition Under Assignments of Error Fourteen to Nineteen.

It clearly and definitely appearing from the defendant's evidence relating to its "over-all" properties and operations that the challenged rate order would not permit the defendant to earn a fair and reasonable rate of return on the fair value of its property used and useful in the public service, the said order was thereby shown to be confiscatory and violative of the defendant's rights under the Due Process Clause of the Fourteenth Amendment to the National Constitution.

Second Additional Proposition Under Assignments of Error Fourteen to Nineteen.

Defendant's evidence as to its over-all properties and operations standing wholly *unrebutted* and *uncontradicted* in the record, it was clearly error for the Court of Civil Appeals to hold that said evidence was insufficient as a matter of law to show in a "clear and satisfactory" way that the challenged rate order was confiscatory. The evidence offered by the plaintiffs on the same issue was in fact legally immaterial and wholly lacking in probative value because it did not relate to the properties and operations covered by the Commission's findings.

Third Additional Proposition Under Assignments of Error Fourteen to Nineteen.

The evidence offered by the defendant as to the *value* of its properties—a proper *rate base*—was such as to clearly authorize the jury to assign to these properties a much higher value than the value found by the Commission, and on the basis of such higher value the challenged rate order was shown by "clear and satisfactory evidence," and by the findings of the Commission covering other relevant factors, to be confiscatory. By accepting such higher value and by blending the evidence and the findings of the Commission covering other relevant factors affecting the problem, the jury was clearly authorized to find that the rate would not yield a fair return on the fair value of the defendant's properties.

Fourth Additional Proposition Under Assignments of Error Fourteen to Nineteen.

Accepting as correct the Commission's findings as to the *value* of defendant's properties used and useful in the public service, \$46,246,617.63, the state of the evidence and the other findings of the Commission in respect to other relevant factors affecting and bearing upon the reasonableness of the prescribed rate, including *fair rate of return* and fair allowance for *annual accruals to reserve for depreciation, depletion and amortization*, was such as to clearly warrant the jury in finding that the rate would not yield a fair return on the fair value of the defendant's properties as found by the Commission.

Fifth Additional Proposition Under Assignments of Error Fourteen to Nineteen.

The holding of the Court of Civil Appeals to the effect that appellant's *unrebutted* and *uncontradicted* over-all evidence was insufficient as a matter of law to show in a clear and satisfactory way that the rate was confiscatory was clearly wrong because it is based upon a denial of the right of the jury to accept some of the findings of the Commission and to reject other findings, as well as its right to accept certain parts of the evidence and reject other parts. Such holding is further based upon a denial of the jury's right to pass upon the credibility of witnesses and the weight to be given their testimony.

Statement.

This case was tried entirely *de novo* in the District Court. Both sides introduced new and additional evidence. The case was tried as an ordinary civil suit except that the jury was instructed in the court's charge that the burden was upon defendant to show by clear and satisfactory evidence that the challenged rate order was unjust and unreasonable as to it. (I, R. 194.)

The Commission found that "the company's Texas properties and its Oklahoma properties constitute parts of an integrated operating system." For that reason it considered the Oklahoma properties and operations and the effect thereof on the expenditures and revenues within Texas. On this basis it fixed a rate for application within the jurisdiction of Texas. (I, R. 15.)

All of the Commission's findings were based upon an "over-all" view of the defendant's properties and operations—upon a consideration of the defendant's entire "integrated system." Defendants alone introduced evidence directly responsive to the Commission's findings and therefore relating to its "over-all" properties and operations. The plaintiffs (defendants in error here) introduced no evidence relating to such over-all properties and operations. Instead, they stood upon their unfounded claim that defendant's over-all evidence was immaterial and wholly lacking in probative value because defendant had made no segregation as between interstate and

intrastate commerce or as between Texas and Oklahoma; and also upon an attempted erroneous segregation of defendant's properties and operations under a geographical standard.

1. *The Commission's Findings.*

The Commission found "a reproduction cost new as of December 31, 1931, for transmission and production properties, exclusive of leaseholds, of \$44,606,337.16"; and "a fair value of leaseholds as of December 31, 1931, of \$1,991,613.92"; and a rate base of \$46,246,617.53 (I, R. 19).

The rate base findings of the Commission are summarized on pages 66-67 and 100 of the Record, Volume I. The book cost of defendant's integrated operating system was found by the Commission to be \$47,696,533.11, as of December 31, 1931 (I, R. 109). This did not include material and supplies, cash working capital, or going concern value.

The Commission found gross revenues for the year 1931 in the amount of \$9,301,862.65. Total expenses for the year were found to be \$4,174,807.47, leaving \$5,127,055.18 available for depreciation, depletion and return on the producing and transmission properties (I, R. 18).

Annual reserve accruals for depreciation and depletion were fixed on a 6% sinking fund basis and amounted to \$968,066.98 for depreciation and \$15,631.45 for depletion. This allowance amounts to

approximately 2% of the rate base found by the Commission (I, R. 19). Detailed findings as to depreciation will be found in I, R. 76-98, and as to depletion, I, R. 99.

Having found \$5,127,055.18 available for depreciation, depletion, return and Federal income taxes for the year 1931, the Commission deducted therefrom depreciation in the amount of \$968,066.98, and thereby found \$4,158,988.20 as the amount available for depletion, Federal income taxes and return for the year 1931. By deducting \$15,631.45 for depletion, it found \$4,143,356.75 as the amount available for return and Federal income taxes for the year 1931, on defendant's integrated operating system (I, R. 99).

The Commission found "a minimum fair rate of return for the year 1931 to be 6%," and that this amounted to \$2,774,797.05 when applied to the rate base as of December 31, 1931. It then computed excess of net earnings over a 6% return at \$1,368,559.70, which amounted to 8.039c per MCF on the domestic gas sold during 1931. On this basis it was determined that the 40c gate rate charged by defendant should be reduced 8c per MCF and a rate of 32c per MCF established in its place (I, R. 102-105).

2. *Evidence in "direct rebuttal" of the Commission's findings.*

Defendant's "over-all evidence covered the same

properties and operations as did the Commission's findings and was in "direct rebuttal" of the findings. The Supreme Court of the United States has found this to be true. *Lone Star Gas Co. v. Texas*, 304 U. S. 224, 228, 242. After directing attention to defendant's over-all evidence (304 U. S. 228) and to its attempt, made after the introduction of such evidence, to segregate its properties, the Court said that the attempt at segregation, however inadequate, could detract nothing "from the force of the proof it had already submitted in *direct rebuttal* of the Commission's findings," and that this over-all evidence could not be ignored because of a futile attempt "to make an unnecessary segregation." In the same connection the Court further said:

"The first and primary ground remained and the determination of the court of first instance as the trier of the facts that the Commission's rate was confiscatory could not properly be set aside by the application of an untenable standard of proof and in disregard of the evidence which had been *appropriately addressed to the Commission's findings* and had been properly submitted to the jury." (Our italics.)

(a) *Evidence as to the value of defendant's properties—the rate base.*

In establishing its contention that the rate prescribed by the Commission, when applied to actual operating experience, would not afford it a reasonable rate of return or even the 6% rate of return which the Commission found to be the minimum, defendant introduced evidence as to (1) the fair value

of its public service property, (2) its operating revenues and expenses, and (3) what constitutes a reasonable rate of return. We now summarize this evidence.

Defendant introduced in evidence an appraisal showing the cost of reproducing its public service property as of January 1, 1933. This appraisal was prepared in great detail and consisted of eight volumes (Deft's Ex. 28, IV, R. 2363). It showed \$73,983,405.57 as the cost of reproduction. *Accrued depreciation* was determined by inspection of the physical property. Fair value was determined by deducting the accrued depreciation thus determined from the reproduction cost new. (II, R. 1141-1171.) In this manner the *fair value* was determined to be \$69,738,021.16 (V, R. 3037); this being in contrast to the Commission's over-all rate base, according to its findings, of \$46,246,617.53.

The January 1, 1933, appraisal was supplemented and brought down to May 1, 1934 (Deft's Ex. 40, V, R. 3047). This supplemental appraisal showed an *increase* in material and construction costs between January 1, 1933, and May 1, 1934, of \$1,579,381.72 (Deft's Ex. 40, V, R. 3052). Defendant's evidence further showed an *increase* between prices for steel pipe and dresser couplings adopted by the Commission and those prevailing at June 11, 1934, of \$3,409,626.91 when applied to defendant's public service property (Deft's Ex. 39, V, R. 3043-3046).

The appraisal was prepared by three experienced and competent engineers, Biddison, Connor and Steinberger. Their qualifications have not been questioned by plaintiffs or any court which has thus far reviewed the case. They were thoroughly trained and experienced engineers (Biddison's qualifications I, R. 609-613; Connor's qualifications II, R. 858-869; Steinberger's qualifications, I, R. 475-481). At all events, it is clear that the qualifications and credibility of these witnesses presented nothing more than questions to be determined by the jury—the triers of fact. The Supreme Court in effect so held (304 U. S. 224, 242).

The engineers testified that the property is well designed, maintained and operated. "It is an excellent property from all viewpoints," they said (I, R. 656). The construction costs applied in the appraisal were based, to a large extent, upon defendant's experience in actual construction. They were determined by an analysis of defendant's construction records (I, R. 638-639). Labor rates applied in the appraisal were those currently prevailing (I, R. 653). The prices for material used in the appraisal were the lowest quoted by leading manufacturers for large lot purchases (I, R. 640-641; II, R. 842-843).*

Biddison explained in detail how the appraisal of the physical properties was prepared (I, R. 613-841; II, R. 1141-1226; III, R. 2002-2029). The manner

*The Court of Civil Appeals criticizes the prices used by defendant for materials. The criticism is unfounded. See pp. 172-3, *infra*. Here, again, the Court is in effect passing on the credibility of witnesses.

in which the collateral costs and non-physical values were determined was carefully explained by the witness Connor (II, R. 869, et seq., Deft's Ex. 28, IV, R. 2602-3007). The volume of gas underlying defendant's developed gas reserves was determined by its regularly employed Production Engineer and Geologist, Dunn. This witness carefully explained how he arrived at the volume of gas underlying the developed gas reserves (I, R. 512-544) and incorporated his results in an exhibit (Deft's Ex. 30, V, R. 3007-3030). Only *proven and producing* reserves were included in this exhibit (I, R. 528-529). These reserves represented only about one-third of the total gas acreage owned and held by defendant (I, R. 530). Dunn testified that defendant's gas reserves would be sufficient to supply its markets for approximately 20 years (I, R. 531, 564).^{*} The developed reserves were evaluated in defendants' appraisal at \$2,681,689.00 (Deft's Ex. 31, V, R. 3031-3033; Deft's Ex. 37, V, R. 3038). Developed reserves were included in the Commission's rate base in the amount of \$727,742.54, being the actual cost thereof to defendant, less depletion. The Commission's method failed to allow for increased value due to development of a lease which was purchased before production was obtained and, for that reason, was obviously wrong.

Undeveloped leaseholds were included in the Commission's rate base at actual cost to defendant in the

^{*}The Court of Civil Appeals states that the reserves will be adequate for forty years. There is no evidence in the record to support this finding.

amount of \$1,263,871.38. The total amount included in the rate base for developed and undeveloped leaseholds was \$1,991,613.92 (I, R. 69-72). Defendant included undeveloped leaseholds in its appraisal in the total sum of \$893,291.28 (Deft's Ex. 32, V, R. 3034-A; Deft's Ex. 37, V, R. 3038), being their actual cost (I, R. 654-655). The Court of Civil Appeals held that nothing should be included in the rate base for undeveloped leaseholds—notwithstanding the Commission thought otherwise—and that defendant's appraisal of the developed leaseholds was excessive. As shown in calculations hereinafter presented, both producing and non-producing leaseholds may be included at actual cost without changing the fact that the Commission's order is shown by defendant's evidence to be confiscatory.

The undisputed evidence shows that the Company's gas reserves were used and useful in and essential to its public service (III, R. 2044, 2060).

The undisputed evidence shows that in proportion to the investment and the volume of defendant's business the amount of its undeveloped leaseholds was very small, barely sufficient to insure adequacy of supply; that the undeveloped leaseholds could be utilized in the reasonably near future and may be regarded as being in the nature of working capital. They were used and useful in the public service (I, R. 654-55).*

*The Court of Civil Appeals made fact findings which are refuted by this undisputed evidence. Its erroneous conclusion is dealt with at pages 168-171, *infra*.

The findings of the Commission that the undeveloped leaseholds should be included in the rate base at their actual cost implies that they were used and useful in the public service. On this point the Court of Civil Appeals has attempted to substitute its finding for that of the Commission.

Considered in the light of the actual cost of defendant's public service properties, as shown by the undisputed evidence, the order was proven in a "clear and satisfactory" way to be confiscatory.

Defendant's evidence showed the actual cost of its public service property as reflected by its books. The capitalized actual costs were: December 31, 1931, \$47,776,749.63 (Deft's Ex. 5, III, R. 2209); December 31, 1932, \$50,034,431.70 (Deft's Ex. 6, III, R. 2212); December 31, 1933, \$49,837,026.06 (Deft's Ex. 8, III, R. 2215); April 30, 1934, \$49,858,751.23, (Deft's Ex. 10, III, R. 2221). These costs did not include overhead construction costs incurred prior to 1927. It was not defendant's policy to capitalize these costs from 1909 to 1927, and a substantial part of the property was constructed prior to 1927. The costs, as reflected by the books, did not include working capital or material and supplies (I, R. 364-365). For other reasons explained in the record, the books understated the actual cost of the property (I, R. 348-452).

The total of all general construction costs capitalized by defendant amounted to \$739,958.75 at December 31, 1933 (I, R. 348-350). If these capi-

talized costs be deducted and the commission's allowance therefor in the amount of \$4,528,968.30 and its allowance for cash working capital in the amount of \$1,488,369.91 be applied in their stead, the *actual cost rate base* will be \$54,917,871.13 at December 31, 1931, *exclusive of the Petrolia Field property*, (which the Court of Civil Appeals condemned as worthless) and going concern value. This rate base, predicated on actual costs for physical property and the Commission's allowance for overheads, is \$8,671,253.60 in excess of the rate base adopted by the Commission. On that basis the rate is clearly shown to be confiscatory.

The Court of Civil Appeals, in Table III attached to its opinion, found the average book costs to be as follows: 1931, \$48,409,002.24; 1932, \$49,484,864.66; 1933, \$50,399,110.82 and 1934, \$50,399,110.82. The court does not mention the fact that the costs thus shown and used by it in making its calculations include nothing for cash working capital, material and supplies, or going concern value, or that they do not include all general construction costs. Inasmuch as the Court's calculations do not include these elements of actual cost, they are manifestly wrong.

Plaintiffs did not sponsor an appraisal of defendant's integrated operating system in evidence in the District Court, but its alleged expert Freese did make an appraisal of defendant's public service property and business as of December 31, 1931, in which he found a reproduction cost new of \$53,005,251.39 (III, R. 1797). This appraisal was

not introduced in evidence by plaintiffs but was used by defendant for impeachment purposes. This appraisal was at least enough to discredit before the jury the appraisal sponsored by Freese at the trial.

The undisputed evidence shows that between December 31, 1931, and June 11, 1934, there was an increase in prices for pipe and dresser couplings of \$3,409,626.91 (V, R. 3043-3047). If this increase in material prices be given proper effect and applied to the reproduction cost new estimate made by plaintiffs' alleged expert as of December 31, 1931, it results in a reproduction cost new at June 11, 1934, of \$56,909,878.30.* On the basis of that valuation the prescribed rate was admittedly confiscatory. This may be compared with defendant's appraisal of *physical properties* at January 1, 1933, of \$55,809,205.16 (V, R. 3037), which includes nothing for general construction overheads, going concern value, or cash working capital. By adding the commission's allowance for preliminary and organization expense in the amount of \$231,555.30 and cash working capital in the amount of \$1,488,369.91 (I, R. 52) to this appraised value for physical properties, the total appraised value would be \$57,529,130.37. On that basis of value the rate was clearly shown to be confiscatory; even on the value assigned by defendant to the *physical properties* alone, \$55,809,205.16.

*"It is true that any just valuation must take into account changes in the level of prices." *West v. Chesapeake & Potomac Tel. Co.*, 295 U. S. 662, 672.

(b) *Operating Revenues and Expenses.*

Operating expenses and revenues were shown in accounting exhibits covering the years 1931, 1932, 1933, and the twelve months ended April 30, 1934. Gross revenues and amounts available for depreciation, depletion and return under the 40c rate, after deduction of actual expenses of operation, were:

12 Mos. Ended	Gross Revenues	Amounts Available for Depreciation, Depletion and Return
12-31-31	\$9,267,270.80	\$4,605,721.83
12-31-32	8,831,205.35	4,658,506.46
12-31-33	7,690,167.01	3,892,748.58
4-30-34	7,923,087.30	4,114,322.81

(Ex. 5, III, R. 2209; Ex. 6, III, R. 2212; Ex. 8, III, R. 2215; Ex. 10, III, R. 2221.)

All expenses of operation claimed by defendant were actually incurred in good faith by the management in the exercise of their best judgment (I, R. 365). They represent actual outlays.

The accounts conform to the classification of accounts prescribed by the American Gas Association (I, R. 315). The Railroad Commission of Texas has not prescribed a classification of accounts (I, R. 375-376).

There was no material dispute between the au-

ditors for plaintiffs and defendant respectively with reference to actual revenues. Plaintiffs' witness so testified (III, R. 1661-1665). The State Court refers to this fact in its opinion. Said the court: •

"With respect to operating expenses except as to a few controverted items, and with respect to revenues, there is no substantial difference in the testimony as to the totals of both Texas and Oklahoma for the years of the accounting period." (V, R. 3364; 86 S. W. (2d) 503.)

Applying the 32c rate prescribed in the Commission's order and eliminating from operating expenses management fees, donations and all other items eliminated by the Commission, and making such adjustments in the operating expenses as the Commission made and the Court of Civil Appeals approved, the following amounts would have been available for depreciation, depletion, Federal income tax and return:

12 Mos. Ended	
12-31-31	\$3,765,160.24
12-31-32	3,908,663.51
12-31-33	2,997,969.38
3-31-34	3,191,162.50

(III, R. 2270-2271)

(c) *Depreciation and Depletion Reserve Accruals.*

Annual accruals to reserve to provide for depreciation, depletion and amortization were estimated by defendant's witness Connor at \$3,465,123.36. This amounts to approximately 5% on the value as appraised by defendant ($\$3,465,123.36 \div \$69,738,021.16$). The estimate was based on the straight line method of reserve accounting, the method actually used by defendant (II, R. 1259-1260).

The Commission used a sinking fund method. It allowed \$968,066.98, or 2.28%, on the depreciable items of property, and approximately 2% on its total rate base, \$46,246,617.53 (I, R. 98).

Connor treated this subject thoroughly both in exhibits and oral testimony (II, R. 1256-1323). Separate accrual rates for each of the various classes of property were determined (Deft's Ex. 41, V, R. 3055).

The basis upon which these accrual rates were determined is set forth in detail in exhibit form (Deft's Ex. 42, V, R. 3057-3196). Briefly stated, the reserve accrual rates were based upon an analysis of the history of the various classes of property. The records examined covered a period from 1909 to 1933 (II, R. 1257; V, R. 3057-3060). This study covered approximately 8,000,000 feet of three-inch equivalent diameter pipe which had been removed, replaced and abandoned (II, R. 1280-1284; V, R. 3073-3080). All factors bearing upon the life of gas wells were analyzed. The history of over 1,000 gas wells which have

been attached to defendant's system was included in this study. The average life of gas wells was thus determined to be four years (II, R. 1268-1276). This may be compared with the Commission's findings of thirteen and one-half years (II, R. 1275). The dates upon which various lines in the system were put into service and the length of their service before replacements were required, were determined (II, R. 1278-1288, 1295-1296). All factors contributing to the mortality of the various classes of property were analyzed and given due weight in the ultimate conclusion.

The record shows that more than 60% of all the pipe in the system was installed new during the seven-year period prior to the date of inquiry (V, R. 3081-3082). Only 20.45% of the total compressor horsepower in service at the date of inquiry had been installed prior to 1922 (V, R. 3175). The pipe lines and compressor equipment constitute the major portion of the total value ascribed to the physical property.

The annual rate of growth is shown in defendant's Exhibit 42 (V, R. 3081). The property had a weighted age of only twelve years at the date of inquiry (III, R. 1860, 2041-2042). Other facts establish that the system was a comparatively new one at the date of inquiry. Hence, the charges against reserve in past years were not deemed to represent the ultimate retirement liability which would accrue as the property grew older. Charges experienced in the past on the smaller property were no criterion for

determining the reserve accruals needed to meet the increasing retirement liability on the larger and newer system.*

On this depreciation, depletion and amortization issue nothing is involved other than questions going to the *quaifications* and *credibility* of witnesses and the weight to be attached to their testimony—questions over which the Court of Civil Appeals has no final power. Properly considered, the plaintiffs offered no legal evidence on this issue because none of the evidence offered by the plaintiffs related to the over-all properties.

(d) *Rate of Return.*

Defendant's evidence showed that a net return of from 8% to 10% was reasonable; that such a return was necessary, considering the hazards of the business, in order for defendant to attract a free flow of capital into its business, insure confidence in the financial soundness thereof, support and maintain its credit, and properly discharge its public service obligations. The Commission had never before allowed less than 7% for return to a natural gas utility (II, R. 1329). The testimony to this effect was given by defendant's engineers Biddison and Connor and two independent bankers, presidents of two of the larger banking institutions in Texas. These witnesses were familiar with the rates of return com-

*The Court of Civil Appeals criticizes defendant's estimate for depreciation and depletion reserve accruals. These criticisms are dealt with under an appropriate assignment of error, pp. 174-183, *infra*.

monly demanded and received by investors in the securities of natural gas enterprises (Connor, II, R. 1324-1330; Biddison, III, R. 2014; Thornton, III, R. 1960-1965; Florence, III, R. 1965-1977).*

The questions here involved obviously relate merely to the qualifications and credibility of witnesses.

3. *Results of application of rate as shown by evidence and Commission's findings.*

Amounts available for depreciation, depletion, Federal income tax and return under the 32c rate prescribed in the challenged order have been set forth at page 115, *supra*. After providing for annual accruals to reserve for depreciation and depletion in the amount estimated by defendant's witness, the following amounts would have been available for Federal income tax and return under the 32c rate, expressed as a percentage of the value of defendant's public service properties as estimated by it:

12-31-31 .....	.43%	
12-31-32 .....	.64	
12-31-33 .....	.67	(Deficit)
3-31-34 .....	.39	(Deficit)

Defendant's evidence also showed that after apply-

* The Court of Civil Appeals approved the Commission's allowance of 6% for rate of return. The error assigned on this holding is herein after discussed, pp. 183-191, *infra*.

ing the challenged 32c rate, adjusting operating expenses to conform to the Commission's eliminations therefrom, computing depreciation and depletion reserve accruals as found by the Commission, the following amounts would have been available for return, expressed as a percentage of the rate base adopted by the Commission:

12-31-31	.....	5.56%
12-31-32	.....	5.76
12-31-33	.....	3.97
3-31-34	.....	4.31

Thus it appears that, considered in the light of the Commission's own findings, the prescribed rate yields less than the "minimum fair return" as found by the Commission—6% (Deft's Ex. 13, Sec. 3, III, R. 2233; for details, III, R. 2268, et seq.).

Upon the same basis, except that operating expenses were those actually incurred, it was shown that the challenged rate would have allowed 3.76% for return on the Commission's rate base, for the twelve months ended April 30, 1934 (Deft's Ex. 14, IV, R. 2304, et seq.).

The *actual capitalized costs* of the property are set out above, p. 111, *supra*. These costs include nothing for cash working capital. The Commission estimated cash working capital at \$1,488,369.91. If this amount be added to the actual capitalized cost and the accrued depreciation be deducted therefrom

as determined by defendant's experts, this determination, as shown in defendant's Exhibit 37 (V, R. 3037), being undisputed and unchallenged, the following amounts would represent actual costs depreciated rate bases:

	Before Deducting Accrued Depreciation	Per Cent Condition of New	Actual Cost Less Accrued Depreciation
12-31-31	\$49,265,119.54	94.26	\$46,437,301.67
12-31-32	51,522,801.61	94.26	48,565,392.79
12-31-33	51,325,395.97	94.26	48,379,318.23
3-31-34	51,361,131.00	95.26	48,413,002.08
Average	50,868,612.03	94.26	47,948,753.70

If the 5% annual rate for depreciation and depletion determined by defendant's expert be applied to the actual costs depreciated rate basis, it results in the following amounts for reserve accruals:

12-31-31	\$2,321,865.08
12-31-32	2,428,269.64
12-31-33	2,418,965.91
3-31-34	2,420,650.10

If these amounts are deducted from the sums available for depreciation, depletion. Federal income tax and return shown above, there remains available for Federal income tax and return on the depreciated actual costs rate basis the following percentages:

12-31-31	3.11%
12-31-32	3.05
12-31-33	1.20
3-31-34	1.59

As heretofore stated, plaintiffs' witness Freese testified that in estimating annual reserve accruals by the straight line method 3.09% of the total property would be a proper amount. If this percentage be applied to the actual cost depreciated rate base, it results in the following reserve accruals:

12-31-31	\$1,434,912.62
12-31-32	1,500,670.64
12-31-33	1,494,920.93
3-31-34	1,495,961.76

After these amounts are deducted from the sums available for depreciation and return shown above, there remains available for return on the depreciated actual costs rate base the following percentages:

12-31-31	5.02%
12-31-32	4.96
12-31-33	3.11
3-31-34	3.50

By taking defendant's evaluation of physical

properties and the Commission's allowance for preliminary and organization expense and cash working capital, the present fair value would be \$57,529,130.37, exclusive of going concern value (for calculations, see pp. 112-113, *supra*). Accrued depreciation has been deducted in arriving at this figure. Applying 5% to this figure for depreciation and depletion reserve accruals, being the percentage determined by defendant's witness Connor, the amounts remaining for Federal income tax and return, expressed as a percentage of the \$57,529,130.37 rate base, would be:

12-31-31	1.54%
12-31-32	1.79
12-31-33 .....	.21
3-31-34 .....	.55

Applying 3.09% to the \$57,529,130.37 rate base, being the amount estimated by plaintiffs' expert for depreciation reserve accruals on the straight line basis, amounts available for Federal income tax and return would be:

12-31-31	3.45%
12-31-32	3.70
12-31-33	2.12
3-31-34	2.46

The Court of Civil Appeals criticized various ele-

ments of defendant's appraisal, operating expenses, and its estimate for annual reserve accruals for depreciation and depletion. We do not concede that these criticisms are tenable. We show that they are untenable under appropriate assignments of error hereinafter presented. For present purposes these criticisms may be considered and given effect in the totality of their consequences. Still the evidence clearly supports the conclusion that the 32c rate is confiscatory. Granting these criticisms for the sake of argument only, we now demonstrate by the following table of figures and appropriate explanations that the challenged rate is confiscatory.

REVENUES, EXPENSES AND AMOUNTS AVAILABLE FOR RETURN

Based on 82c Domestic Gate Rate and Operating Expenses as Set Out by Commission

Depreciation and Depletion as Testified to by Defendant's Witness

	Dec. 31, 1931	Dec. 31, 1932	Dec. 31, 1933	Mar. 31, 1934
Amount Available for Depreciation, Depletion, Federal Income Tax and Return (Note 1) --	3,765,160.24	3,978,890.81	3,093,567.60	3,293,167.05
Depreciation and Depletion (Note 2) -----	942,546.08	942,546.08	942,546.08	942,546.08
Amount Available for Federal Income Tax and Return (Note 3) -----	2,822,614.16	3,036,344.73	2,151,021.52	2,350,620.97
Federal Income Tax (Note 4) -----	216,527.86	256,841.59	145,744.27	175,769.90
Amount Available for Return (Note 5) -----	2,605,986.30	2,779,503.14	2,005,277.25	2,174,851.07
Rate Base No. a (Note 6) -----	48,506,490.31	50,764,132.38	50,566,776.74	50,602,511.77
Rate Base No. b (Note 7) -----	50,252,481.96	50,252,481.96	50,252,481.96	50,252,481.96
Amount Available for Return (Note 8)				
Base a -----	5.37	5.48	3.97	4.30
Base b -----	5.19	5.53	3.99	4.33

Note 1. Defendant's Ex. 13 (III, R. 2283-2285 also IV, R, 2297-2303). The revenues are based on the 32c rate and the operating expenses have been adjusted to conform to the Commission's eliminations, averages and adjustments. Management fees have been excluded. Donations allowed by the Commission have been included. Regulatory expenses have been amortized over a ten-year period. Dry hole and canceled and surrendered lease expenses have been amortized as the Commission amortized them.

Note 2. Plaintiffs' estimate for annual reserve accruals. This figure covers the amount plaintiffs' witness admitted would be required for depreciation and depreciation reserve accruals on the Texas properties only. It is applied here to the integrated operating system because it is the estimate made by plaintiffs at the trial in the District Court. It is less than the Commission's allowance for the whole property. The Commission allowed \$968,066.98 for depreciation and \$15,631.45 for depletion. (I, R. 97-99.)

Note 3. Calculation.

Note 4. Federal income taxes calculated at prevailing rates, after deduction of interest payments. Depreciation and depletion have been taken at the rate estimated by plaintiffs' witness. See Note (2).

Note 5. Calculation.

Note 6. Actual book cost as shown at pp. 111-112

less actual cost of the Petrolia field property, in the amount of \$758,619.23 (Plaintiffs' Ex. 4, III, R. 2125). This book cost includes general construction costs in the amount of \$739,958.75 as of 12/31/33. All of such costs were not capitalised on the books (I, R., 348-451). The Commission allowed \$4,528,968.30 for construction overheads, being administration and legal expense, engineering and supervision during construction, taxes during construction, interest during construction, and preliminary and organization expense (I, R. 47-52). Cash working capital has been added to the actual book cost in the amount allowed by the Commission, \$1,488,369.91 (I, R. 52).

Note 7. This represents defendant's appraisal of the physical properties, less accrued depreciation in the amount of \$55,809,205.16 (Ex. 37, V, R. 3037); from which undistributed general costs and general supervision in the total amount of \$8,932,012.77 have been eliminated (Ex. 37, V, R. 3038-3039). There is also excluded defendant's appraisal of the Petrolia field property in the amount of \$687,781.13. Collateral construction costs and working capital have been included in the amount allowed by the Commission, being \$6,017,337.16 (I, R., 47-52). The Commission's allowance for overheads has not been used; only the actually capitalized amount of such overheads—an amount greatly less than the amount allowed by the Commission—has been used. Developed leaseholds have been included at actual cost less depletion, as allowed by the Commission, in the amount of \$727,742.54 (I, R. 71-72). Undeveloped

leases have been included at actual cost, as included in defendant's appraisal, in the amount of \$893,291.28 (V, R. 3038).

Note 8. Calculation.

See 20th, 25th, 26th, 27th, and 28th grounds of Motion for Rehearing; also 9th ground of Supplemental Motion for Rehearing.

Argument.

In the Statement just submitted (*supra*, pp. 103-125) we have demonstrated, as we believe and now respectfully submit, the over-all evidence is entirely sufficient to establish in a "clear and satisfactory" way that the prescribed rate is confiscatory in its actual application to defendant's properties and business. At all events, the over-all evidence is entirely sufficient in law to raise an issue of fact in support of its claim of confiscation; and that issue was settled in its favor in the District Court. In this connection it should be held in mind that the plaintiffs (defendants in error in this Court) offered no evidence in the District Court in rebuttal of this over-all evidence. Instead, they relied solely upon their sponsorship of what the Supreme Court of the United States has held was "an untenable standard of proof" and on an attempted geographical segregation made by them—a segregation that was erroneous according to the holding of the Supreme Court. In these circumstances, defendant's over-all evidence stood

unrebutted and uncontradicted by any other evidence heard in the District Court.

In the foregoing Statement we have presented various views and analysis of the evidence that could have been accepted by the triers of fact in the District Court as the basis for a finding, supported by clear and satisfactory evidence, that the prescribed rate would not yield a fair return on the fair value of defendant's property even as valued by the Commission itself. We have discussed the confiscation issue not only in the light of defendant's over-all evidence but in the light of the Commission's findings as well as in the light of various permissible blendings of the evidence and the findings. In that way we have demonstrated that the record clearly furnished the basis—a basis supported by "clear and satisfactory evidence"—for a finding that the prescribed rate was confiscatory. These may now be briefly summarized:

(a) *The rate base.* Defendant's over-all evidence was amply sufficient to support a finding assigning to its properties a much higher value than that given to them in the Commission's findings. The Supreme Court of the United States has so held (304 U. S. 224, 242). On the basis of such higher value, and accepting as correct all other findings of the Commission, the prescribed rate is shown to be confiscatory.

(b) *Depreciation allowance.* There was "clear and satisfactory evidence" that the allowance for

annual accruals to a reserve for depreciation, depletion and amortization, as made by the Commission, was too low. The acceptance of the depreciation allowance sponsored by defendant's witness, or even of a compromise allowance lower than that claimed by the defendant and higher than the Commission's, would have required a finding that the prescribed rate was confiscatory even when considered in the light of the Commission's rate base and the Commission's findings relating to other relevant factors in the inquiry.

(c) The same applies to certain other *operating expenses and revenues* that have already been discussed in detail.

(d) And the same applies to the issue of fair *rate of return*. What constitutes a fair rate of return is primarily the subject of expert testimony involving simply an inquiry as to the qualifications and credibility of the expert witnesses testifying in the inquiry. In this case, if the triers of fact accepted the testimony of the defendant's witnesses on the issue of fair rate of return, the rate order was shown to be confiscatory even upon the basis of an acceptance of every other finding made by the Railroad Commission.

We respectfully submit that the opinion of the Court of Civil Appeals evidences an erroneous approach to the problem under discussion. The very statute under which the trial was conducted subjects the orders of the Commission to a factual inquiry to

determine whether it is "unreasonable and unjust." The inquiry in the Court of Civil Appeals, properly viewed, was simply this: Is there evidence in the record that the jury was entitled to credit as true that was sufficient when credited to show in a "clear and satisfactory" way that the rate was confiscatory? If such evidence is in the record, then, in view of the verdict, it should be conclusively presumed that such evidence was credited by the jury.

In determining whether the rate order has been shown to be confiscatory by "clear and satisfactory evidence" the evidence must be viewed as a whole and considered in the light in which the jury had the right to consider and blend it. If possible blendings properly could have been made sufficient to support the verdict, then it should be presumed that these blendings were in fact made. This is but another way of stating that, if there is evidence in the record sufficient to sustain the verdict, then it should be presumed that such evidence was credited by the jury and that their verdict was based upon it.

Plaintiffs in this case have made no attempt to overturn the verdict under a proper test—a test involving consideration of the evidence as a whole; a test involving the right of the jury to determine the credibility of witnesses and to credit certain parts of the evidence and to refuse to credit other parts of the evidence. The Court of Civil Appeals made no attempt to analyze the evidence as a whole or to demonstrate that the evidence could not be blended with the findings in such a way as would sustain the ver-

dict. Instead of approaching the problem in this way, parts of the evidence were selected by the Court that were unfavorable to the verdict—parts presumptively rejected by the jury—and these rejected parts have been blended in an effort to show that the verdict could not be sustained.

If the Court's opinion is to stand, then what becomes of the power and essential duty in a case like this to determine the credibility of witnesses testifying in the reviewing court?

Defendant established that the challenged rate order was confiscatory by showing that it would not afford a reasonable rate of return when applied under well-known operating conditions. It showed that when applied to its operating experience for the years 1931, 1932, 1933, and a part of 1934, it would not produce a reasonable rate of return—not even the 6% return which the Commission held to be the minimum to which it was entitled.

In *Smyth v. Ames*, 169 U. S. 466, 528, the court said:

“The first and most important contention of the plaintiffs is that, if the statute had been in force during any one of the three years preceding its passage, the defendant companies would have been compelled to use their property for the public substantially without reward or without the just compensation to which it was entitled. We think this mode of calculation for ascertaining the probable effect of the

Nebraska statute upon the railroad companies in question is one that may be properly used."

Defendant's evidence followed established principles for measuring the return afforded by, and the illegal effect of, the challenged rate. Defendant presented evidence with respect to the fair value of its property—both reproduction cost new less accrued depreciation, and historical cost; evidence showing operating expenses and revenues; evidence showing what rate of return was necessary in order to attract a free flow of capital into its business, assure confidence in the financial soundness thereof, support and maintain its credit and enable it to properly discharge its public service function. *Bluefield Waterworks & Imp. Co. v. Pub. Serv. Comm.*, 262 U. S. 679, 693.

All of the elements thus involved were purely factual. "But the determination as to their rights turns almost wholly upon the facts to be found. Whether their property was taken unconstitutionally depends upon the valuation of the property, the income to be derived from the proposed rate, and the proportion between the two—*purely matters of fact*. When those are settled the law is tolerably plain. All their constitutional rights, we repeat, depend upon what the *facts* are found to be." *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, 228.

What value the return must be computed upon involved a fact issue. "To an extent value must be a matter of sound judgment, *involving fact data*."

West v. C. & P. Tel. Co., 295 U. S. 662, 671. "The original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, * * * are all matters for consideration, and are to be given such weight as may be just and right in each case." *Smyth v. Ames*, 169 U. S. 456, 547; *McCardle v. Indianapolis Water Co.*, 272 U. S. 400, 410.

What annual sum should be allowed as a charge against operating expenses, for accruals to reserve for depreciation, depletion and amortization is a *question of fact*. "The question of the amount which should be allowed annually for depreciation is a *question of fact*." *Clark's Ferry Bridge Co. v. Comm.*, 291 U. S. 227, 240.

What constitutes a reasonable rate of return is a *fact question*. "What will constitute a fair return in a given case is not capable of exact mathematical demonstration. It is a matter more or less of approximation about which conclusion may differ. The court in the discharge of its constitutional duty on the issue of confiscation must determine the amount to the best of its ability in the exercise of a fair, enlightened and 'independent judgment as to both law and facts.'" *United Rys. & Elec. Co., v. West*, 280 U. S. 234, 251.

As pointed out by Mr. Justice Holmes in the *Prentis* case, from which we have just quoted, all of these fact issues had to be settled before the legal question

of whether the challenged rate was confiscatory could be settled. The issue in the District Court being whether the rate was confiscatory, it is manifest that the fact issues had to be determined in that court by the appointed triers of fact. To say, as the Court of Civil Appeals does, that only a law question and no issue of fact is involved, is to ignore the obvious truth so well stated by Mr. Justice Holmes in the *Prentiss* case—"the determination as to their rights turns almost wholly upon the facts to be found." And "finality as to facts becomes in effect finality in law." *Crowell v. Benson*, 285 U. S. 22, 57. It cannot be gainsaid that the jury's finding that the challenged rate was confiscatory is supported by clear and satisfactory evidence. And, the Court of Civil Appeals was without power to substitute its fact findings for the fact findings of the appointed triers of fact in the District Court, and render final judgment.

IV.

THE EVIDENCE ESTABLISHES THAT THE RATE ORDER WAS NOT SUSTAINED BY SUBSTANTIAL EVIDENCE.

Twentieth Assignment of Error.

The Court of Civil Appeals erred in holding that the Commission's findings of fact are supported by substantial evidence.

Twenty-first Assignment of Error.

The Court of Civil Appeals erred in holding that the Commission's order is supported by substantial evidence.

Twenty-second Assignment of Error.

The Court of Civil Appeals erred in holding that the defendant failed to discharge the alleged burden devolving upon it to show that the Commission's rate order was not sustained by substantial evidence. If the burden devolved upon defendant, which defendant does not concede, to demonstrate that the Commission's order was not sustained by substantial evidence, the defendant submits that the evidence was entirely sufficient to show in a clear and satisfactory way that the Commission's order was not sustained by substantial evidence.

First Proposition Under Assignments of Error Twenty to Twenty-two.

At the trial in the District Court plaintiffs introduced no evidence as to defendant's "over-all" properties and operations. Instead, they stood on their claim, now condemned by the Supreme Court of the United States, that defendant's over-all evidence was legally immaterial and on their geographical segregation of defendant's properties and business that the Supreme Court has condemned. In these circum-

stances, defendant's evidence as to its over-all properties and operations stood un rebutted and uncontradicted. It was entirely sufficient to show in a clear and satisfactory way that the Commission's order was not sustained by substantial evidence.

Second Proposition Under Assignments of Error Twenty to Twenty-two.

The tabulations and analyses of the evidence presented in the opinion of the Court of Civil Appeals, when properly considered, show that the Commission's order is not supported by substantial evidence.

Statement and Argument.

See 43rd ground of Motion for Rehearing; also 4th and 5th grounds of Supplemental Motion.

1. *The plaintiffs introduced no evidence in support of the Commission's findings and order.*

There was no evidence introduced upon the trial in the District Court in support of the Commission's findings. The Commission's findings—findings upon which its order rested—related to defendant's entire integrated operating system. (I, R. 14-16). The evidence offered by plaintiffs in the district court did not relate to this entire integrated system. It related to a *segregated part* of the integrated system—the part situated in Texas only.

The Supreme Court of the United States held (*Lone Star Gas Co., v. Texas*, 304 U. S. 224, 242) that the validity of the Commission's order should be tested by evidence relating to the "integrated operating system," that is, evidence responsive to the Commission's findings, as distinguished from evidence such as offered by the plaintiffs in the district court, based upon an attempted segregation of the "integrated operating system." The Supreme Court pointed out that defendant's over-all evidence was submitted "in direct *rebuttal* of the Commission's findings," and further that the jury's finding that the rate was confiscatory could not properly be set aside "by the application of an untenable standard of proof and in disregard of the evidence which had been appropriately addressed to the Commission's findings and had been properly submitted to the jury." (304 U. S. 242). Under the same view, plaintiffs' evidence should have been responsive to the Commission's findings and in *support* of the findings.

Plaintiffs offered no such evidence in the district court. They claimed that a segregation was necessary and the evidence they offered was based upon an attempted segregation—a mere geographical segregation. Plaintiffs offered no evidence controverting the over-all evidence introduced by the defendant covering the "integrated operating system" of the defendant. The evidence thus offered by plaintiffs in the district court was never offered before or considered by the Commission, as appears from its findings. Not even the Commission has

passed judgment on this evidence; hence it is not evidence that was accepted by the Commission in the promulgation of the challenged order.

The Court of Civil Appeals does not show that the Commission's order is supported by substantial evidence and the Court's tabulations, when properly considered, show that the order is not supported by substantial evidence.

2. *The tabulations attached as appendices to the opinion of the Court of Civil Appeals.*

In an effort to demonstrate that the Commission's findings and order were supported by substantial evidence, the Court of Civil Appeals sets forth, as appendices to its opinion, four tables of figures and computations. In only one of these tables, Table III, does the court purport to show by figures and computations taken from the evidence that the commission's findings and order are supported by substantial evidence. We, therefore, deal with Table III only.

This table, when properly considered and analyzed, instead of showing that the evidence supports the commission's findings and order, shows quite conclusively that they are not supported by substantial evidence.

Table III contains several set-ups. Under one set-up the *average* costs of the public service properties, as reflected by the books, are used as a rate

base. Although not mentioned by the court, this average cost rate base does not include all general construction costs, nor does it include anything for cash working capital, material and supplies, or going concern value. In another set-up the Court uses the Commission's rate base at December 31, 1931, plus net capital additions from that date forward to and including March 31, 1934. Prior to that date the actual cost of the property, as reflected by the books, is used.

The Court of Civil Appeals shows in Table III that, by eliminating all operating expenses eliminated by the Railroad Commission, accepting the Railroad Commission's allowance for depreciation reserve accruals, and by adding assumed revenues to actual revenues—revenues which admittedly were never received by defendant—the following amounts would be available for return under the challenged rate: (1) On the average book cost rate base: 5.75% for 1931, 5.55% for 1932, 5.12% for 1933, and 5.18% for the twelve months ended March 31, 1934; (2) on the commission's rate base plus net capital additions at cost: 6.01% for 1931, 5.66% for 1932, 5.34% for 1933 and 5.40% for the twelve months ended March 31, 1934.

It is manifest that the two set-ups just mentioned wholly fail to demonstrate that the challenged rate would yield defendant the 6% return per annum which the Commission stated is the minimum to which defendant is entitled.* This is true although

*The Commission found: "We find six per cent to be the ~~minimum~~ fair rate of return * * *." (I. R. 102-3.)

operating expenses, depreciation reserve accruals and rate base conform to the Commission's findings.

In search of a better showing for the challenged order, the Court of Civil Appeals then made two additional set-ups. In these set-ups it used the average annual charges against depreciation reserves from 1927 through March 31, 1934, inclusive, instead of the annual amount which the Commission found to be necessary for this purpose. The Court uses \$344,000.00 whereas the Commission allowed \$983,698.43 and thereby the Court substitutes its findings for that of the Commission. No witness, not even the Commission's witnesses, testified that the average annual *charges* against reserve were a proper criterion of what the annual *accrual* to the reserves should be. In this way the court shows returns in excess of 6% per annum during the years in question.

The Court relies upon the *average return* for the years 1927 through March 31, 1934, to support its conclusion. Under the first set-up in Table III the *average* return for this period is shown to be 6.98%, but the return for the years 1931, 1932, 1933 and the twelve months ended March 31, 1934, is shown to be materially less than 6% by the Court's own calculations. These calculations, therefore, show that under the facts and the *actual experience* of the company the prescribed rate was confiscatory for the years last mentioned.

Just as "present confiscation is not atoned for by

merely holding out the hope of a better life to come" (*West Ohio Gas Co. v. Public Utilities Comm.*, (No. 2), 294 U. S. 79, 83), so present confiscation is not atoned for or excused by resurrecting the earnings of the past. Here the court demonstrates that upon the average book cost, which does not include cash working capital, material and supplies, or all of the overhead costs in constructing the property; and after adding to actual revenues hypothetical or imaginary revenues of \$513,768.97 for the year 1933 and \$313,018.52 for the twelve months ended March 31, 1934; and after eliminating from operating expenses all management fees and donations; and after accepting the Commission's allowance for depreciation reserve accruals, the prescribed rate would still fail to produce the minimum 6% return during the years 1931, 1932, 1933 and the twelve months ended March 31, 1934.

In passing, and before further discussing the point immediately under consideration, we direct attention to the fact that the Court has clearly erred—even accepting its "average" theory as correct—in making the hypothetical temperature adjustment additions to revenues for the year 1933 and the twelve months ended March 31, 1934. *Averages*, correctly arrived at, are based on *actual* experience for each and every year. It is manifestly erroneous after arriving at an average to then make hypothetical additions to the actual revenues of the company for a part of the period. On the same theory the defendant might as well contend that hypothetical *deductions* should be made from the revenues enjoyed during

the better years in arriving at a correct average. As to the year 1933 and the twelve months ending March 31, 1934, the Court has made *two* additions and not merely *one*, as the table at first blush would suggest, to the company's *actual* revenues. The first addition the Court has made by averaging the low revenues of the two years mentioned with the comparatively high revenues of earlier years. And then the Court makes the second addition by use of the so-called temperature adjustment. In other words, after converting the two years mentioned into average years, the Court then makes another addition to actual revenues under the guise of the so-called temperature adjustments. Can it be seriously argued that calculations so manifestly erroneous both in point of law and in point of fact constitute "substantial evidence" supporting the order?

Now coming directly to the point as to whether *average experience* validly may be substituted for *actual experience* during the last three and one-half years used in the Court's table. May the company be compelled to suffer confiscation during the three and one-half years mentioned merely because its actual earnings for prior years were adequate? We think not. The Court properly may not sustain a rate that is presently confiscatory by averaging earnings over an eight-year period.

It is well settled that *earnings* of the past cannot be used to sustain a confiscatory rate any more than deficits of the past can be used to invalidate a rate which is presently compensatory. *Knoxville v. Knox-*

ville Water Co., 212 U. S. 1; *Galveston Electric Co. v. Galveston*, 258 U. S. 388; *Georgia Ry. & Power Co. v. Railroad Commission*, 262 U. S. 625; *Newton v. Consolidated Gas Co.*, 258 U. S. 165; *Board of Pub. Util. Commrs. v. N. Y. Tel. Co.*, 271 U. S. 23; *Los Angeles G. & E. Corp. v. Railroad Commission*, 289 U. S. 287.

In *Board of Pub. Util. Commrs. v. N. Y. Tel. Co.*, *supra*, the Court said:

"Past losses cannot be used to enhance the value of the property or to support a claim that rates for the future are confiscatory. * * * *Profits of the past cannot be used to sustain confiscatory rates for the future.*"

In *Los Angeles G. & E. Corp. v. Railroad Commission*, *supra*, the Court said:

"Deficits in the past do not afford a legal basis for invalidating rates, otherwise compensatory, *any more than past profits can be used to sustain confiscatory rates for the future.*"

Furthermore, the earnings of 1927, 1928, 1929 and 1930 pertain to a different economic era and furnish no adequate criterion of present requirements. *A. T. & S. F. Ry. Co. v. United States*, 284 U. S. 248, 260, 261.

The Court's holding that the rate was not confiscatory when applied to the years 1931, 1932, 1933 and the year ended March 31, 1934, arrived at by aver-

aging earnings over an eight-year period conflicts with the rules announced in the cases just cited. It likewise conflicts with the equally well settled rule that a utility is entitled to a reasonable return on the fair value of its property "*at the time it is being used for the public.*"

Bluefield Waterworks & Imp. Co. v. Pub. Serv. Comm., 262 U. S. 679:

"Rates which are not sufficient to yield a reasonable return on the value of the property used, *at the time it is being used to render the service, are unjust, unreasonable and confiscatory* * * *."

See also: *Willcox v. Consolidated Gas Co.*, 212 U. S. 19; *Lincoln G. & E. Co., v. Lincoln*, 223 U. S. 349; and *McCardle v. Indianapolis Water Co.*, 272 U. S. 400.

Additional authorities to the same effect could be cited.

Another related rule is that the legislative prophecy of earnings under a prescribed rate must square with experience when the rate is applied. The Court ignores this rule and applies another rule—the rule which applies only to the *legislative process* of fixing the rate. That the *legislative rule* does not apply to the *judicial process of determining* whether the legislative prophecy is valid is clearly shown by the opinion of Mr. Justice Cardozo when he was on the New York Court of Appeals in *Municipal Gas Co. v.*

Commission, 121 N. E. 772. The following quotation is taken from the opinion in that case:

"A statute prescribing rates is one of continuing operation. It is an attempt by the Legislature to predict for future years the charges that will yield a fair return. *The prediction must square with the facts, or be cast aside as worthless.* * * * It must square with them in one year as in another, at the beginning, but equally at the end. In all such legislation, from the hour of its enactment, there thus inheres the seed of an infirmity which the future may develop. It is the infirmity that always waits upon prophecy; *the coming years must tell whether the prophecy is true or false.* All that we can say at the outset is that the power to regulate exists. The validity of its exercise depends upon the nicety of the adjustment *between forecast and events.* This is as true of a regulation which looks forward a year as of one which looks forward a decade or a century. In either case, with differences only of degree, there is a forecast of the future, which must be justified by results. Into every statute of this kind, we are to read, therefore, *an implied condition.* The condition is that the rates shall remain in force at such times and *at such only* as their enforcement will not work denial of the right to a fair return. When the return falls below that level, the regulation is suspended. * * *

"We turn to the precedents, and they give strength to our conclusion. We find no support in them the principle, now pressed on us by counsel, of confiscation, if only it is avoided today, may be practiced with impunity tomorrow. On the contrary, through repeated decisions there runs the consistent thought, that, in controversies of this order, *experi-*

ence is the final test, that the courts must bide their time, and let the workings of the law decide."

The views which Justice Cardozo expressed in the *Municipal Gas Company* case were not changed by his later experience on the bench of the Supreme Court of the United States. In *West Ohio Gas Co. v. Pub. Util. Comm.*, (No. 2) 294 U. S. 79, 82, he again said:

"Estimates for tomorrow cannot ignore prices for today. * * * A forecast gives us one rate. A survey gives another. To prefer the forecast to the survey is an arbitrary judgment."

These two opinions of Mr. Justice Cardozo clearly and emphatically refute the idea that actual confiscation of property for one to four years may be justified simply because past earnings, when averaged with the deficient earnings, afford a compensatory average return. Manifestly, if the company had suffered deficits during 1927 through 1930, the Court would not be willing to throw these deficits into the calculations for subsequent and better years.

If the earnings of former years are eliminated then it is obvious that the calculations relied upon by the Court do not support the prescribed rate when applied to the years 1931-1934.

We now deal with certain additional objections to the correctness of the computations shown in Table III. As above stated, the set-up shown in this table contains a hypothetical addition, on account of so-

called temperature adjustments, to the actual revenues of 1933 amounting to \$513,768.97 and \$313,018.50 for the twelve months ended March 31, 1934.

No court has ever sanctioned the addition of hypothetical revenues for the purpose of determining whether a rate is confiscatory as applied to a particular year. To do so "is to prefer prophecy to experience." What a rate-making agency may *legislatively* prophesy in prescribing the rate is one thing; the actual experience of the utility, proven in a *judicial inquiry*, as to the reasonableness of the rate is quite another. *West Ohio Gas Co. v. Public Utilities Commission* (No. 2), 294 U. S. 79, 82, per Mr. Justice Cardozo, *supra*, 143.

The Court of Civil Appeals ignored the distinction between a legislative inquiry, made for the purpose of determining what rate should be promulgated—which inquiry does not involve the issue of confiscation at all—and the subsequent judicial inquiry in respect to the actual application of the rate.

"A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative not

judicial in kind." *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, 226.

Defendant does not challenge the right of the Commission to take into consideration abnormal weather conditions, as well as abnormal conditions of any kind, as a basis of making its prophecy as to what a particular rate will yield in the future. It does object to what was done by the Court of Civil Appeals in this case. The court added *hypothetical revenues*—*revenues* which defendant did not receive at all—in the amount of \$513,768.97 for the year 1933, and \$313,018.50 for the twelve months ended March 31, 1934, to *actual revenues*. There is no substantial evidence to support the addition of assumed revenues to actual revenues in determining the *effect* of the challenged rate *when applied*. There is no authority for such action.

These substantial additions to actual revenues were made on the theory that the temperature during 1933 and 1934 was abnormally warm and that if it had been normally cold defendant would have received revenues in excess of what it actually received during those years. Thus, the Court of Civil Appeals resorted to guesswork to sustain the rate when actual earnings were available, and told their own tale as to the effect of the challenged rate. It has preferred a "forecast to a survey." It has attempted to atone for present confiscation by "holding out the hope of a better life to come." Such arbitrary action has been specifically condemned.

West Ohio Gas Co. v. Public Utilities Comm. of Ohio
(No. 2), 294 U. S. 79, 81-83.

If only these arbitrary additions to actual income be eliminated, then the amount available for Federal income tax and return on the cost rate base for the year 1933, instead of being 5.12% as shown by the court, will be 4.10%; and for the twelve months ended March 31, 1934, instead of being 5.18% as shown by the court, will be 4.55%.

The foregoing rates of return are based on actual costs as reflected by the company's books. The criticisms which the court has leveled at the Company's appraisal in reference to material prices, costs of excavation, going concern value, valuing of gas reserves, taxes during construction, etc., cannot apply to the *book costs* because these represent actual costs which no one has successfully assailed; and the criticism made to operating expenses cannot apply because the expenses allowed by the Commission and adopted by the court have been used.

It is further established by undisputed evidence that the costs, as reflected by the company's books, do not include overhead construction costs incurred prior to 1927, or cash working capital and for other reasons fully explained in the record, undertake the actual costs of the property (see details, p. 111, *supra*). If the Commission's allowance for general construction costs and cash working capital be added, and the Petrolia Field property be eliminated, the actual cost rate base will be \$54,917,871.13 (see de-

tails, p. 111, *supra*). Accepting the computation of the Court of Civil Appeals for all other items, it appears that the amount then available for Federal income tax and return would have been 4.70% for 1933 and 4.75% for 1934 on this cost rate base. And if the arbitrary additions to actual revenues just above mentioned be eliminated and actual revenues be used, the amount available for Federal income taxes and return on this cost rate base would be 3.76% for 1933 and 4.18% for the twelve months ended March 31, 1934.

Manifestly, these results not only refute the contention that the Commission's findings and order are supported by "substantial evidence," but they clearly and definitely demonstrate that the findings and order will result in a confiscatory rate of return to defendant.

Computations appearing in Table III make no allowance whatever for Federal income taxes for the years 1931, 1932, 1933, and 1934. The Supreme Court of the United States has repeatedly recognized the propriety of including Federal income taxes as an expense of operation. *Galveston Elec. Co. v. Galveston*, 258 U. S. 388; *Georgia Ry. & Power Co. v. Railroad Commission*, 262 U. S. 625.

In the second basis employed in Table III the same factors were used as in the first basis except that the Commission's rate base, plus capital additions, was used. Upon this basis the court shows a return of 6.01% for 1931, 5.66% for 1932, 5.34% for 1933,

and 5.40% for 1934. This rate base does not take into account increases in prices for material and labor. It includes only the additions to property. Manifestly, if the Commission's rate base had been correct as of December 31, 1931, still it should be increased in proportion to the increase in materials and labor prices for the subsequent years. The Commission's rate base purported to be based upon a reproduction cost new estimate. The undisputed evidence shows an increase for prices in steel pipe and dresser couplings as of June 11, 1934, over those adopted by the Commission of \$3,409,626.91 (Deft's Ex. 39, V, R. 3043-3046). But if this increase in prices for pipe and dresser couplings be entirely disregarded and the Commission's rate base adopted, as shown in Table III, which does not include anything for the Petrolia Field property, and all other computations set forth in Table III be adopted, except the arbitrary additions to revenues for 1933 and 1934, the amounts available for Federal income taxes and return are shown to be 4.28% for 1933 and 4.75% for 1934.

The third basis used in Table III is identical with the first basis except that instead of using the Commission's allowance for reserve accruals the court uses the average annual charges against the reserve during the years 1927 through March 31, 1934, in the amount of \$344,871.84. That this figure is not substantial evidence of what is required to provide for depreciation, depletion and amortization is perfectly obvious. The Commission did not adopt this figure and no witness has testified that it would

be adequate. There is no substantial evidence in the record to support the use of this figure as being the proper amount for annual reserve accruals.

Here the Court abandons the findings of the Commission and substitutes a much lower figure for depreciation reserve accruals. *The substituted amount is 65% below the amount allowed by the Commission.* It amounts to .71% for 1931, .70% for 1932 and .68% for 1933 on the book cost of the property. The State's witness Freese estimated \$848,546.48 for depreciation and admitted that \$94,000.00 additional would be required for depletion on the Texas properties alone. This would make a total of \$942,546.48 which the State's alleged expert estimated would be required for depreciation and depletion on the Texas properties alone. This is \$597,674.64 more than the Court of Civil Appeals used for both Texas and Oklahoma in the computation here referred to.

The fallacy of using *average* charges against the reserve from 1927 through March 31, 1934, inclusive, is apparent from Table III itself. The table shows that in 1927 the average book cost of the property was \$29,517,879.08, and that the property account increased each subsequent year until it reached \$50,399,110.82 in 1933. The court erroneously assumed that the charges against reserve for depreciation, depletion, removals, replacements and abandonments of property in 1927, 1928, and 1929 were a criterion for determining reserve accruals on the much larger property that existed in 1933. Further-

more, the use of average charges against reserve for past years ignores the fact that at the date of inquiry the property was a comparatively new one. It had a weighted age of only twelve years (III, R. 1850, 2041-2042). More than 60% of all the pipe in the system was installed new during the seven-year period prior to the date of inquiry (V, R. 3081-3082). Only 20.45% of the total compressor horse power in service at the date of inquiry had been installed prior to 1922 (V, R. 3175). Obviously charges experienced in the past on the smaller property are no criterion for determining the reserve accrual requirements needed to meet the increasing eventual retirement liability on the larger and newer system. The use of average annual charges for prior years as a criterion for determining reserve accruals on this property ignores the important and indisputable fact that where, as in this instance, there has been a rapid growth, retirements at one point of time will relate for the most part to the smaller preceding plant, while the depreciation reserve account is currently building up to meet the increased eventual retirement liability of the enlarged plant. See *Lindheimer v. Illinois Bell Tel. Co.*, 292 U. S. 151, 171.

Basis No. 4 in Table III is identical with basis No. 2, except that the *average* annual charges against reserve have been used in connection with the Commission's rate base rather than the allowance made by the Commission for reserve accruals.

Here again the Court abandons not only the evi-

dence but also the findings of the Commission. It may be clearly, if not necessarily, inferred from the Court's opinion that these two computations—the third and the fourth—are presented as being based upon “substantial evidence.” We respectfully submit that they are not based upon *any* evidence and are in express conflict with the Commission's findings.

It is apparent from Table II that the Court did not and could not rely upon an appraisal submitted by the State for determining the rate base of the *entire integrated system*. The State at the trial in the District Court did not submit an appraisal of the entire integrated property. Its appraisal was limited to the Texas properties. The only evidence showing what its alleged expert determined the reproduction cost new of the entire integrated system to be was the appraisal made by the witness Freese as of December 31, 1931, which showed a reproduction cost new at that date of \$53,005,251.39 (III, R. 1796). This appraisal was not introduced in evidence by the State, but was used by the company for impeachment purposes.

Plaintiffs' Exhibit 4 (III, R. 2125) shows net additions to the Texas property alone of \$1,500,843.28 between the date of this appraisal and March 31, 1934. If there be added to this appraisal as of December 31, 1931, the increases in prices for pipe and dresser couplings alone as shown in the company's Exhibit 39, \$3,409,626.91 (V, R. 3043-3047), the reproduction cost new as of June 11, 1934, would

have been \$56,909,878.30. Upon this property base the challenged rate would be confiscatory under any set-up conceived by either the plaintiffs or Court of Civil Appeals.

Nowhere in Table III does the Court rely upon any estimate of reserve accruals put forward by the State. It could not do so because the State's witness confined his estimate to the Texas properties alone. Furthermore, the Court's calculations could not be supported by considering and including any estimate of reserve accruals put forward by the Commission, or by any witness, either for the over-all properties or for the Texas properties alone. To sustain its calculations the Court was compelled to select the figure \$344,000.00, representing only the charges to the depreciation reserve, and being only approximately 35 per cent of the amount allowed by the Commission and about 38 per cent of the amount allowed by the State's expert witness Freese for the Texas properties alone.

It is interesting to note that in Table III the Court uses the Commission's rate base as though it were confirmed by the evidence. In this connection the Court assumes the very point in issue. It assumes that the Commission's rate base is supported by substantial evidence but it does not point out any evidence which confirms the Commission's base. The Court points to no reproduction cost new or fair value estimate which supports the Commission's rate base, and the actual cost is shown in Table III to be considerably in excess of the Commission's rate base

for the years 1931, 1932, 1933, and March 31, 1934. How can the Court conclude then, that the Commission's rate base is supported by substantial evidence? The only evidence to which it refers shows that the rate base is too low.

It is apparent that the Court of Civil Appeals resorts to a blending of the evidence in the computations upon which it relies to sustain the challenged order. What the Court does is to pick and choose evidence or testimony and blend it together in an effort to show that the Commission's findings and order are supported by evidence. Manifestly, this requires the exercise of power to select and weigh the facts and testimony—a power which the Court of Civil Appeals denies to the trial court. We have shown that if the facts and evidence, and even the tables and computations made by the Court of Civil Appeals are fairly and properly considered, they do not support the order. If the Court of Civil Appeals may exercise the power which it here asserts, nevertheless it must exercise this power in a reasonable way, which we submit it has not done in the instant case.

As further conclusive evidence that the Commission's rate is not supported by substantial evidence and that the Commission's findings do not support its order, witness the table of computations set forth at page 123, *supra*. In that table we have resolved every doubt in favor of plaintiffs and have pared down operating expenses, rate base, and all other items unsparingly, and it is nevertheless shown that the challenged rate would not yield the 6% return

which the Commission found was a minimum return. ♣

3. *Plaintiffs' evidence does not support the Commission's findings or order because it does not relate to the properties and operations covered by the findings and order; it relates to the Texas properties and operations alone and was based upon an erroneous theory of segregation. Furthermore, it is otherwise faulty in many material particulars.*

Aside from the major defect in plaintiffs' evidence arising because of their failure to treat the properties and operations as the Commission had treated them, that is as a unit, there are other important defects therein.

Plaintiffs excluded from their appraisal of the Texas properties all of the production system property located in Texas and also the expenses incurred in the operation of such properties (III, R. 1795-1796, 1903-1905). This property was used and useful in defendant's public service (III, R. 2044-2045).

Plaintiffs found a reproduction cost new for defendant's Texas gathering, transmission, compressing and general property of only \$40,256,862.39 as of June 15, 1934 (Pltfs' Ex. 6, III, R. 2141, et seq.). This figure includes nothing for going concern value (III, R. 1793-1794; 2108). The Texas properties thus segregated by plaintiffs had a book cost of \$44,053,612.30 as of March 31, 1934. This figure includes the production system properties in Texas

which were eliminated from plaintiffs' appraisal. It includes net capital additions to Texas properties at actual cost from January 1, 1932, to March 31, 1934, in the sum of \$1,500,843.28 (Pltfs' Ex. 4, III, R. 2125). This book cost figure did not include cash working capital, materials and supplies, or going concern value.

Plaintiffs' evidence showed \$2,721,854.13 for the year 1933, and \$2,714,877.13 for the twelve months ended March 31, 1934, available for return after application of the 32-cent rate prescribed in the Commission's order. This amounted to 6.76% for the former period and 6.74% for the latter period of the value of the Texas properties as appraised by plaintiffs in the amount and manner hitherto stated (Pltfs' Ex. 8, III, R. 2164). The amount thus determined to be available for return was arrived at after eliminating all expenses incurred by defendant in the operation of its production system properties and after making an arbitrary addition to actual revenues of \$441,240.12 for the year 1933, and \$268,829.64 for the twelve months ended March 31, 1934. These additions to revenues were based on the theory that the year 1933 and the twelve months ended March 31, 1934, were abnormally warm periods. They represent plaintiffs' calculation of the additional amount that defendant would have received under the 32-cent rate if the weather had been colder and more gas had been sold (Pltfs' Ex. 8, III, R. 2164-2165). Plaintiffs' calculations substitute prophecy for experience; forecast for a survey.

Plaintiffs estimated annual reserve accruals to provide for depreciation at \$848,546.48 (Pltfs' Ex. 7, III, R. 2159, 1843). This amounted to 2.11% on the value of the Texas property as appraised by plaintiffs in their Exhibit 6 (III, R. 2142-2143). This estimate was based on the sinking fund method. Plaintiffs' witness testified that if he had used the straight line method in computing depreciation reserve accruals he would have used the percentage of 4.205 on the physical properties, including the production system properties. He also testified that on the straight line basis he would have used a percentage of 3.0902 on both the physical and non-physical properties (III, R. 1873-1874). This would have amounted to approximately \$1,404,355.61 upon plaintiffs' valuation of the physical properties in Texas, plus the production system properties at cost ($\$40,256,862.39 + \$5,191,539.42 = \$45,448,401.81 + 3.09\% = \$1,404,355.61$). Plaintiffs' expert admitted that his estimate would be insufficient to meet the calculated future mortalities unless supplemented by the existence and use of a credit balance in the reserve account at the date of inquiry of \$5,000,000.00 for the transmission line equipment alone. It was assumed that this credit balance, together with future accumulations, would be further supplemented by interest at the rate of 6% per annum compounded (III, R. 1860-1862). Nothing was included in the estimate for depletion of gas reserves or for depreciation on the production system properties. The estimate or allowance was therefore plainly inadequate; defendant was plainly entitled

to such allowance on account of the depletion of its wasting assets. Plaintiffs' expert conceded that at least \$94,000.00 would be required for these purposes on the Texas properties (III, R. 1912-1913).

The effect of plaintiffs' elimination of defendant's production system properties and expenses and their failure to provide for depletion and return thereon, is thus shown:

(a) The Commission included in its rate base \$4,674,285.91 for defendant's production system properties (I, R. 100). All of these properties were eliminated by plaintiffs.

(b) The Commission made an allowance for expenses in operating the production system property of \$247,732.86 for the year 1931, this being the year upon which the Commission made its determination (I, R. 21, 104).

(c) The Commission included approximately \$116,000.00 for depreciation and depletion of the production system properties (III, R. 1912).

(d) The Commission determined that it would require \$636,533.46 to provide for operating expenses, depreciation, depletion, and a 6% return on the value included by it in the rate base for production system properties (I, R. 104). Plaintiffs allowed only \$212,031.46 for the year 1933, and \$232,644.65 for the twelve months ended March 31, 1934, for the same purpose (III, R. 2165).

The only intimation in the record of the value which plaintiffs' alleged expert ascribed to the integrated operating system is the appraisal which he prepared as of December 31, 1931. In this appraisal he found a reproduction cost new of \$53,005,251.39 (III, R. 1797); and as heretofore shown, the increases in material prices from December 31, 1931, to May 1, 1934, in the amount of \$3,409,626.91 (V, R. 3043-3047) would have increased this appraisal to \$56,909,878.30. Manifestly, this appraisal of plaintiffs' expert does not support the Commission's rate base of \$46,246,617.53 (I, R. 19).

At the trial of the case in the District Court the same expert testified to an evaluation of \$40,256,862.39 for the Texas properties (Plfts' Ex. 6, III, R. 2143), as of June 15, 1934. This is \$7,000,000.00 less than the same expert evaluated the Texas properties at December 31, 1931, notwithstanding the net capital additions to public service property in Texas alone of \$1,500,843.28 from January 1, 1932, to March 31, 1934 (III, R. 2125), and a very material increase for material and labor, heretofore mentioned. Thus, it is patent that the value ascribed to the Texas properties by plaintiffs' expert at June 15, 1934, is inconsistent with his prior determination. The pertinent and undisputed facts indicate a much higher value at the latter date than at the former but this expert, one upon which plaintiffs relied, obtained a value \$7,000,000.00 lower.

Plaintiffs' alleged expert, who made the evaluation, used prices prevailing as of January 1, 1933.

He admitted that the net increases in prices from January 1, 1933, to June 15, 1934, on transmission line equipment alone amounted to \$1,269,688.28. His appraisal does not give effect to this increase (III, R. 1745-1746). The witness could not give a breakdown of his cost in respect to the pipe lines (III, R. 1769-1770). He relied on information furnished by contractors in respect of the cost of hand excavation (III, R. 1771-1772). He had never had any experience in welding pipe lines (III, R. 1778) or laying threaded and coupled pipe (III, R. 1776-1777). His appraisal did not include defendant's gas wells, gas well equipment, gas leaseholds, gas reserves or other production system property (III, R. 1795-1796). His appraisal did not represent his independent judgment based upon experience (III, R. 1760-1762). He had had no actual experience in designing, constructing or operating properties such as were included in his appraisal (III, R. 1735, 1775-1776). He had no experience in laying natural gas pipe lines (III, R. 1762). The excavation costs which he used in preparing the appraisal were based on \$.375 per cubic yard for machine excavation, whereas defendant's actual costs for machine excavation amounted to \$.4646 per cubic yard (III, R. 1923; Deft's Ex. 47, V, R. 3317). Defendant's excavation costs were based on a labor rate of 35 cents per hour, whereas the rate prevailing at the date of inquiry was 40 cents per hour (III, R. 1923-1928). The overhead or collateral construction costs applied in plaintiffs' appraisal amounted to approximately 11.8% (III, R. 2023), whereas experience shows

such costs to run approximately 18% (III, R. 2010). The excavation costs used by plaintiffs were 36.4% under excavation costs experienced by defendant (Deft's Ex. 47, V, R. 3317; III, R. 1925, et seq.).

V.

OTHER ERRORS IN DETERMINING CONFISCATION ISSUE.

Twenty-third Assignment of Error.

The Court of Civil Appeals erred in holding, in effect, that the Meridian Gas Company properties, acquired by defendant at a cost of \$1,338,406.21, and the Southern Oil & Production Company properties, acquired by defendant at a cost of \$966,600.11, should not be included in the rate base.

First Proposition Under Twenty-third Assignment of Error.

The evidence showing, and the Railroad Commission having found, that these properties were used and useful in the rendering of the public service rendered by defendant, their value was properly included in the rate base.

Second Proposition Under Twenty-third Assignment of Error.

The Court of Civil Appeals, having included the revenues from these two properties in computing the amount available to the defendant for a fair return on all of its public service properties, clearly erred in holding that the value of these two properties should not be included in the rate base. To include the revenues accruing from these properties and at the same time to exclude from the rate base the properties yielding these revenues is manifestly erroneous and amounts to a plain denial of the "rudiments of fair play."

Statement and Argument.

The holding of the Court of Civil Appeals in this connection is manifestly erroneous in substance and in detail. That is to say, the Court of Civil Appeals clearly erred in its general holding that these properties should not have been included in the rate base; and further erred in its statement of the reasons assigned in support of its holding.

This holding of the Court is erroneous:

(1) Because it is in conflict with the findings of the Commission. The Commission found, as we shall hereinafter show, that these two properties were used and useful in the rendering of the public service rendered by the defendant.

(2) This holding of the Court is inconsistent with its other holding that the revenues accruing from these properties should be included as a part of the defendant's total revenues out of which it was to secure a fair return on the value of its properties. In other words, the Court of Civil Appeals included the revenues accruing from these properties and, at the same time, excluded the value of the properties from the rate base. The revenues derived from the sales of gas supplied by these properties is included by the Court of Civil Appeals in computing the amount available to the defendant for fair return. Having included the revenues, it was clearly wrong to exclude the properties yielding the revenues.

We now consider in some details the reasons assigned and the statements made by the Court of Civil Appeals in support of this holding:

1. At pages 30 and 31 of its opinion, the Court refers to the acquisition by defendant of properties of Meridian Gas Company "at a 'book cost' of \$1,338,406.21." The Court states that "a careful examination of the record fails to reveal any necessity for the acquisition of these properties or their usefulness to the company; or in any event, the evidence is not clear and satisfactory in that regard." The Court then sets forth a table showing the total gas sales and the total gas purchases (Opinion, p. 30). From this table the Court concludes "that the company made very little use of the production properties taken over during 1932." It is manifest that the table does not show or purport to show the

extent of the use of any particular property. The Meridian properties may have been used to capacity for aught that the table demonstrates.

In connection with the table, the Court overlooks the important fact that defendant was purchasing gas from Meridian Gas Company from 1927 until the properties were purchased in 1932, and that such purchases are included under the column of the table showing gas purchases. This alone refutes the court's statement that "the following statement clearly shows that the company made very little use of the production properties taken over during 1932." Of course, the table would not reflect that defendant was using the Meridian properties other than its purchases of gas therefrom during the years prior to 1932, the date it acquired them.

2. The Court is clearly in error in stating that there is no evidence of the usefulness of these properties. The Court recognizes that they were "primarily production" properties. The undisputed evidence shows that the company's production system properties are used and useful and necessary in its public service operations (III, R. 2044). No witness, and not even the Commission, questioned the usefulness of the Meridian properties in defendant's public service operations. In fact, the Commission treated them as being used and useful. The Commission made an allowance of \$70,227.30 for providing a return on the Meridian properties "which were brought into the system since the date of the valuation submitted to us" (I, R. 108).

The inclusion of the Meridian properties in the Commission's reckoning must be taken as evidence that they were used and useful in the public service. On this point the Court of Civil Appeals is inconsistent. At page 10 of its opinion, the Court said:

"The question of what property was used and useful was primarily for the Commission to determine."

But in respect of the Meridian and Southern Oil & Production Company properties the Court ignores the fact that the Commission, by including them in the rate base, determined that they were used and useful in the public service.

3. What has been said above with respect to the Meridian properties applies also to the properties acquired from Southern Oil & Production Company. The Commission refers to these properties in its opinion, thus:

"The Southern Oil and Production properties were acquired on October 1, 1932, at a book cost of \$766,600.11 for *the public service properties*. Inasmuch as this latter property was a part of the Lone Star Gas Company properties for the last three months of 1932, there would be an addition to the average rate base of $\frac{1}{4}$ of \$766,600.11 or \$191,650.03." (I, R. 110.)

From this statement it is apparent that the Commission regarded the Southern Oil & Production

Company properties as being used and useful in the public service. It refers to them as public service properties and includes them in the rate base for the year 1932 at 1/4 of their actual cost, instead of their entire cost, because they were purchased by the company October 1, 1932, and were not owned by it during the entire year.

4. The Court of Civil Appeals refers to the fact that "the appraisal presented by the company before the Commission does not contain either of these properties, and neither does the appraisal presented by the Commission's experts" (Opinion, p. 31). It is clear from the Commission's opinion heretofore referred to and from the opinion of the Court at page 29 that both the company's and Commission's appraisals before the Commission were dated as of December 31, 1931. It is evident, therefore, that these appraisals could not have included the Meridian and Southern Oil & Production Company properties which were acquired in 1932. But defendant did include the properties in its appraisal in the District Court which was dated as of January 1, 1933.

The properties purchased from Meridian Gas Company, which are readily identified in defendant's appraisal in the District Court, were: Gas reserves, \$173,079.00 (V, R. 3032); gas well equipment, \$578,148.78 (IV, R. 2369); gaining of rights-of-way, \$702.00 (IV, R. 2371); field measuring station structures, \$3,473.48 (IV, R. 2371); measuring station equipment, \$12,905.92 (IV, R. 2374); field line equipment, \$63,691.04 (IV, R. 2377).

Of course, plaintiffs did not include the Meridian properties in their District Court appraisal because these properties are principally located in Oklahoma and their appraisal in the District Court was confined to property located in Texas, exclusive of production system property.

5. The Court's statement that "there is not sufficient evidence in the record to warrant their consideration for any purpose" (Opinion, p. 31) might apply with equal force and with as much justification to all of defendant's property. There is no evidence to show that they were not used and useful in the public service; and they were regarded as being used and useful in the public service by the Commission itself. During the trial in the District Court neither the defendant nor plaintiffs selected segments of defendant's system with a view to proving that any specific segment was essential to the public service operations. The Court could, with as much ease and logic, have selected any pipe line, gas well or compressor station and excluded it on the grounds that the record does not reveal any necessity for its construction or acquisition.

The true rule, we respectfully submit, is that, in the absence of a challenge of good faith properly supported by evidence, the good faith of the defendant's managers is to be presumed and a court will not substitute its judgment for theirs in respect to the prudence of a particular investment or outlay they have made.

In *West Ohio Gas Co. v. Commission* (No. 1), 294 U. S. 63, 72, the Court, speaking through Mr. Justice Cardozo, said:

“Good faith is to be presumed on the part of the managers of a business. *Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 262 U. S. 276, 288, 289. In the absence of a showing of inefficiency or improvidence, a court will not substitute its judgment for theirs as to the measure of a prudent outlay. *Banton v. Belt Line Ry. Corp.*, 268 U. S. 413, 421; *Brooklyn Borough Gas Co. v. Prendergast*, 16 F. (2d) 615, 623; *New York & Richmond Gas Co. v. Prendergast*, 10 F. (2d) 167, 181.”

The injustice of an appellate court selecting segments of property and excluding them from the rate base on the ground that there is no specific evidence showing the necessity for their acquisition is too plain to require argument. If the plaintiffs had questioned the propriety of including the Meridian and Southern Oil & Production Company properties in the rate base during the trial in the District Court, the company would have had an opportunity to deal with these properties specifically. But no question was raised or issue made by plaintiffs in this connection. For this reason defendant did not select these properties any more than it selected other segments of its system for the purpose of showing their usefulness or the necessity for their acquisition. For the Court of Civil Appeals to sustain a challenge made for the first time on appeal with regard to the inclusion of these properties in the

rate base denies to defendant an opportunity to meet the challenge by evidence. If an appellate court may raise or sustain objections of this character which were not raised in the trial court, then defendant is at the mercy of the appellate courts because it cannot anticipate during the trial what particular segment of property the appellate court may select for elimination on grounds such as the Court of Civil Appeals assigns.

Twenty-fourth Assignment of Error.

The Court of Civil Appeals erred in holding that the Petrolia Field property should be excluded from the rate base.

Statement and Argument.

1. See Twenty-first ground of Supplemental Motion for Rehearing. Also Thirty-second ground of Motion for Rehearing.

2. At pages 28 and 29 the Court refers to the fact that the Commission excluded the Petrolia field property from its rate base. The Court then concludes that "the company in no way refuted in the trial court these findings by the Commission." Here the Court is in error. Upon the trial in the District Court the witness Hulcy testified that all the Petrolia field property was used and useful in the public service

(I, R. 318). The actual cost of this property at December 31, 1931, was (I, R. 316-317):

Gas Rights	\$347,922.91
Gas Wells	137,689.06
Pipe Lines	190,205.73
Regulating and Measuring Stations	6,503.99
Buildings	5,459.44
Total.....	<hr/> \$687,781.13

It is apparent from the Commission's findings that the Petrolia field property was actually used in defendant's public service operations. The opinion shows that in 1931, 379,984 M. cubic feet of gas were produced from the field. The Commission actually allowed the well-head price for this amount of gas and included in its operating expenses \$16,187.32 for the year 1931. The Commission also included "the full salvage value of all the equipment in the Petrolia field as part of working capital." It is apparent that defendant cannot abandon fields simply because the cost of production increases as the field becomes depleted. If the Petrolia field were abandoned, a charge against the depreciation reserve would have to be made in the amount at least of the actual cost of the property. Moreover, it is apparent that the property in the field would have at least a salvable value as material and supplies or would have a value as a replacement in other fields or locations.

The question then under the Commission's findings is not whether the property should be included in the rate base, but rather at what value it should be included. And in going further and in holding that *nothing* should be included in the rate base on account of this Petrolia property, the Court of Civil Appeals, as we respectfully submit, clearly erred.

Twenty-fifth Assignment of Error.

The Court of Civil Appeals erred in holding, in effect, that the defendant's undeveloped gas leasehold properties, actually costing defendant \$893,-291.18, were not used and useful in the public service and should be excluded from the rate base.

First Proposition Under Twenty-fifth Assignment of Error.

The evidence showing that these properties were "used and useful," and the Commission having found that they should be included in the rate base, it was clearly error for the Court of Civil Appeals to hold that they should not be included.

Statement and Argument.

1. See the Thirty-third ground of the Motion for Rehearing; also the Twelfth ground of the Supplemental Motion for Rehearing.

2. The Court of Civil Appeals held that the undeveloped leasehold properties should not be included in the rate base. (Opinion, p. 10.)

The Commission found the contrary. It included in its rate base undeveloped leasehold properties at actual cost in the amount of \$1,263,871.38. (I, R. 69-82, 99.) The Court thus, without legal authority, substituted its findings for that of the Commission.

In discussing the Petrolia field properties the Court of Civil Appeals said:

"The question of what property was used and useful was primarily for the Commission to determine." (Opinion, p. 10.)

Here, as well as in other connections, the Court affirms the right of the Commission to say what property should be included in the rate base—that is, the right of the Commission to determine what property is used and useful in the rendering of public service. The Court of Civil Appeals here denies to the trial court and to the jury the right to exercise its independent judgment on this matter. But the Court of Civil Appeals, while denying this right to the trial court and jury, itself claims and exercises the same right. It holds that what the Commission included in the rate base for undeveloped leaseholds should be excluded.

In the trial in the District Court defendant included in its appraisal undeveloped leaseholds at

actual cost in the amount of \$893,291.28. (V, R. 3038, 3034-3034-A.) The Court of Civil Appeals states that defendant's developed and productive leaseholds were shown to be more than adequate for its gas needs for more than forty years and therefore excluded all undeveloped leaseholds from the rate base. This statement is not supported by the evidence. The evidence shows that defendant's gas reserves would last approximately twenty years. (I, R. 531.) Furthermore, the Court's statement that there is an adequate open market supply of cheap gas is not supported by the evidence.

It seems obvious that the value of the undeveloped leases held by the company and included in its appraisal is entirely reasonable, taking into account the magnitude of its business. Natural gas reserves are wasting assets. The depletion of gas fields is a common occurrence, and frequently the depletion occurs in advance of expectation. The result is that a company which serves many cities and towns with its gas supply would indeed be short-sighted and poorly managed if it did not provide in advance against the depletion of its supply.

The undisputed evidence shows that defendant's undeveloped leaseholds were small in amount when compared with the magnitude of its business and that they could be utilized in the reasonably near future and should be regarded as in the nature of working capital. (I, R. 654-655.)

In *Wichita Gas Co. v. Public Service Commission*, 2 Fed. Supp. 192, 798-799, the Court said:

"The commission held that certain gas leases claimed to be held by the Cities Service Gas Company for gas reserves were in excess of the required reserves, and that they were in fact being held for speculative purposes. The evidence established, and we have found, that the officers and directors of the Cities Service Gas Company, who are men of broad experience in the natural gas business, in the exercise of an honest and, we think, sound business judgment, determined that such leases were necessary to afford it an adequate reserve, and that such leases were acquired and are held by it as bona fide reserves, and not for speculation.

"The commission was not empowered to substitute its judgment for that of the officers and directors of the Cities Service Gas Company as to the amount of leases necessary to afford an adequate gas reserve, in the absence of a showing of abuse of discretion by such officers in that regard (citing authorities)"

There is no evidence of the exercise of poor judgment or bad faith in the purchase by the company's managers of these undeveloped leaseholds. Presumably they acted upon reliable geological surveys and other scientific information. No fraud or bad faith being charged, it should be presumed that they acted in good faith and in the exercise of proper judgment in the purchase of these leaseholds. *West Ohio Gas Co. v. Commission* (No. 1), 294 U. S. 63, 72.

Certainly this presumption should be recognized in a case where it was recognized, as here, by the regulatory board. No burden devolved upon the defendant to offer affirmative evidence in *support* of the Commission's findings.

Twenty-sixth Assignment of Error.

The Court of Civil Appeals erred in holding that the prices for materials used by defendant in its appraisals were not quoted prices, less all available discounts.

(Submitted as a Proposition.)

Twenty-seventh Assignment of Error.

The Court of Civil Appeals erred in finding that the quoted prices for materials used by the defendant in its appraisal were far above the prices obtained by the defendant in actual purchases.

(Submitted as a Proposition.)

Statement and Argument.

1. See Eighteenth and Nineteenth grounds of the Supplemental Motion for Rehearing.
2. We here adopt without repetition the state-

ment and argument presented in the Supplemental Motion for Rehearing filed in the Court of Civil Appeals, pp. 92-94, inclusive.

The undisputed evidence there reviewed shows that defendant not only claimed to have obtained, but actually did obtain and apply in its appraisal, the lowest prices quoted by any manufacturer for large lot purchases after giving effect to all available discounts. (Supplemental Motion, pp. 92-93.) Defendant's witness Holloway, Sales Manager for Jones & Laughlin, one of the major steel manufacturers in the United States, examined the prices used by defendant and stated that they were *rock bottom* prices, to which no further discounts would apply. (III, R. 1978-1979.)

The Court of Civil Appeals makes the further statement that the Commission's witness Freese testified that large lot purchases could be obtained at prices ten or fifteen per cent, or more, below the quoted prices. (Opinion, p. 38.) Mr. Freese did testify on direct examination, but on cross examination he was unable to substantiate this statement by reference to actual facts. (III, R. 1763-1765.)

The Court of Civil Appeals further refers to what it calls a "good example" of the results of the use of quoted prices rather than actual prices currently paid. (Opinion, p. 38.) The record shows conclusively that the 24-inch pipe which the Court uses as a "good example" was purchased in 1933 and consisted of only 6300 feet and was purchased at a dis-

tress sale, and was not in standard condition, and was an odd lot of pipe. (II, R. 902, 905-906; III, R. 2045-2046.) It was not included in defendant's appraisal. (II, R. 902-5.)

Twenty-eighth Assignment of Error.

The Court of Civil Appeals erred in holding that the excavation costs claimed by the defendant were too high and that the Commission's findings concerning these items were sustained by the evidence.

(Submitted as a Proposition.)

Statement and Argument.

1. See Twentieth ground of Supplemental Motion for Rehearing, p. 94.
2. We here adopt without repetition the statement and argument submitted in the Supplemental Motion for Rehearing, pp. 94-97, inclusive.

In this connection the Court of Civil Appeals greatly emphasizes the testimony of the witness Dobson, ignoring the fact that his credibility as a witness was pertinently assailed before the jury and that, in view of the facts brought out, the jury had the right to discredit his testimony. (See the Supplemental Motion, pp. 94-97.)

Twenty-ninth Assignment of Error.

The Court of Civil Appeals erred in holding insufficient as a matter of law defendant's evidence with respect to annual accruals to reserves for depreciation, depletion and amortization, and in holding in that connection that the amount of such annual accruals properly should be measured by and limited to the average annual charges made against such reserves.

(Submitted as a Proposition.)

First Additional Proposition Under Twenty-ninth Assignment of Error.

There is no "substantial evidence," and in fact no evidence, to the effect that the amount that should be allowed on account of annual accruals to the depreciation, depletion and amortization reserves is properly measured by and limited to the average annual charges to such reserves. Here, again, the Court of Civil Appeals undertakes to substitute its findings for those of the Commission. It substitutes a much lower figure for depreciation reserve accruals than was allowed by the Commission. In fact, the substituted amount is only approximately 35 per cent of the amount allowed by the Commission.

Statement and Argument.

1. See Twenty-fourth, Twenty-fifth and Thirty-fourth grounds of the Supplemental Motion for Rehearing.

2. The Court of Civil Appeals criticizes defendant's estimate for annual accruals to reserve to provide for depreciation, depletion, removals, replacements and abandonments of property. Defendant's estimate had a sound factual basis. It was predicated upon a study and analysis of mortalities and requirements on defendant's system over a long period of years. Defendant's witness Connor, who made the estimate, studied an impressive amount of historical data and conformed his estimate to what the factual data indicated would be required for future depreciation, depletion, removals, replacements and abandonments of property.

The Court of Civil Appeals compares defendant's estimate with the average annual charges made against the reserve from 1927 through the twelve months ended March 31, 1934, inclusive, which amounted to an average of \$344,871.00 per annum. This comparison is fallacious. Not even the Commission adopted it as a proper guide to what would be required for reserve accruals in the future. The commission, on a sinking fund basis, allowed \$968,066.98 for annual reserve accruals. Plaintiffs' witness estimated that on the sinking fund basis \$942,546.08 would be required for depreciation and

depletion of the Texas properties alone. He made no estimate in the District Court of what would be required on the properties situated in Oklahoma. The actual charges against the reserve during the early years of 1927 through 1932 were occasioned by mortalities and requirements on a much smaller property than that which existed in 1933 and 1934. Table III, attached to the Court's opinion, shows that in 1927 the average book cost of the property was only \$29,517,879.08, and that it increased materially with each succeeding year until it reached the peak of \$50,399,110.82 in 1933. Manifestly, the requirements for depreciation, depletion, removals, replacements and abandonments of property in 1927 and the other years when the property account was much smaller than at the date of inquiry, afford no basis or proper guide to what these requirements would be on the much larger and more extensive property existing in 1933 and 1934. It is a matter of vital importance that defendant's property has had a rapid growth in recent years. At the date of inquiry it had a weighted age of only 12 years (III, R. 1860, 2041-2042). It is obvious that the mortalities experienced with respect to this comparatively new property are much less than what will be experienced as the property grows older. The Supreme Court of the United States has recognized that "where as in this instance, there has been a rapid growth, retirements at one point of time will relate for the most part to the smaller preceding plant, while the depreciation reserve account is currently building up to meet the 'increased eventual retirement liability' of the enlarged plant." *Lind-*

heimer v. Illinois Bell Telephone Co., 292 U. S. 151, 171.

Plaintiffs' own witness Freese recognized this fact. This witness shows in his Exhibit 7 (III, R. 2160) that the rate for replacements at the 12th year—the weighted age of the property in question at the date of inquiry—was 1.01%. He shows that this rate of replacements increases with each succeeding year until it reaches 3.43% in the 42nd year.

The purpose in making a reserve accrual estimate on the straight line basis, the basis followed by defendant's witness Connor, is to average out this increasing mortality rate so that it may be provided for by uniform average annual accruals. Clearly, the increasing requirements of the future had to be taken into account in making a rational estimate of an average annual charge to be applied in the future. Plaintiffs' Exhibit 7 (III, R. 2162-C) shows that the average life of steel pipe is 33 1/3 years, and that the ultimate requirements for replacements have been scarcely approached at the 12th year—the weighted age of the property in question at the date of inquiry. For these reasons, among others, the claim that the average annual *charges* against the reserve are a measure of what the annual *accruals* should be in order to provide for the increasing eventual retirement liability is without factual support.

The Court of Civil Appeals states that the amount claimed by defendant for annual accruals to reserve, "when compared with their witness Biddison's testi-

mony that the properties had depreciated only 5.74% during their entire life, places the company in an untenable position with regard to depreciation." This is fallacious reasoning. In the first place, the Court overlooks the fact that the per-cent condition of the physical property, as determined by defendant's witness Biddison, was 92.93%. The amount of depreciation suffered in the physical properties was thus shown to be 7%. This is equivalent to \$4,245,384.00, the difference between the reproduction cost new of the physical properties and the present value at January 1, 1933 (Deft's Ex. 37, V. R. 3037). This represents the loss in value of the property due to its use in the public service and the reserve account must be adequate to compensate defendant for this loss. *Board of Pub. Util. Commr's. v. N. Y. Tel. Co.*, 271 U. S. 23. But that is not the only proper function of the reserve account. It must provide not only for the loss in value in the property due to its use in the public service, but also the costs of removals, replacements and abandonments of property which take place from time to time and which must be considered apart from the per-cent condition of the property at a given date. *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 13, 14.

"Before coming to the question of profit at all the company is entitled too earn a sufficient sum annually to provide not only for current repairs but for making good the depreciation and replacing the parts of the property when they come to the end of their life. The company is not bound to see its property gradually waste, without making provision out of earnings for its replacement. It is entitled to see

that from earnings the value of the property invested is kept unimpaired, so that at the end of any given term of years the original investment remains as it was at the beginning. It is not only the right of the company to make such a provision, but it is its duty to its bond and stockholders, and, in the case of a public service corporation at least, its plain duty to the public."

The reserve account must also provide for depletion of gas reserves. *Columbus G. & F. Co. v. Public Util. Comm.*, 292 U. S. 398, 404, 405. "To withhold from a public utility the privilege of including a depletion allowance among its operating expenses while confining it to a return of $6\frac{1}{2}\%$ upon the value of its wasting assets is to take its property away from it without due process of law, at least where the waste is inevitable and rapid."

The reserve account must also provide for amortization of certain classes of property. *Knoxville v. Knoxville Water Co.*, 212 U. S. 1. The per-cent condition of the property at a given date affords no measure of what will be required for removals, replacements, depletion and amortization in the future.

"Many different causes operating differently at different times with respect to different sorts of property produce the ultimate loss against which protection is sought. As the accruals to the depreciation reserve are the result of calculations which are designed evenly to distribute the loss over estimated service life, the accounting reserve will ordinarily be in excess of the actual depreciation."

Lindheimer v. Illinois Bell Tel. Co., 292 U. S. 151, 171.

The Court of Civil Appeals says that "the company used an interest rate of 7% in applying the sinking fund method of spreading the accrual. In the trial court they used 5%. As the rate of interest applicable to the balance is reduced, the annual requirements are increased. The reduction of the interest rate from 7% before the Commission to 5% in the trial court accounts in part for the increase in the company's estimated annual requirements in the trial court" (Opinion, p. 44). Here the Court is in error in so far as its statement implies that defendant's estimate for annual reserve accruals was based on the sinking fund method. It was based on main, on the straight line method, as heretofore stated.* There were certain items of property which were amortized and the amortization fund credited with an annual interest rate. Of defendant's total estimate for annual reserve accruals of \$3,465,123.36 only \$350,514.52 (V, R. 3056) was subject to amortization, and it is to this portion only that the Court's remarks here referred to can be applicable. The reduction in the interest earned on this amortization

*The straight line method is the method generally used in creating a reserve to provide for depreciation, removals, replacements and abandonments of properties having varying lives, such as the property under consideration. In *Lindheimer v. Ill. Bell Tel. Co.*, 292 U. S. 151, 167, 168, the Court observed: "In this instance, the company used the 'straight line' method of computation, a method approved by the Interstate Commerce Commission. 177 I. C. R., pp. 408, 413. By this method the annual depreciation charge is obtained by dividing the estimated service value by the number of years of estimated service life. The method is designed to spread evenly over the service life of the property the loss which is realized when the property is ultimately retired from service."

fund from 7% to 5% was due to the fact that this amortization fund must be invested in the highest grade of securities, which the witness Connor thought at the date of trial would not bring more than 5% return. We think his opinion in this regard is beyond question. If defendant, engaged in the hazardous business of producing and transporting natural gas, is allowed to earn no more than a 6% return, it is manifest that investments in sound and safe securities yielding in excess of 5% cannot be had.

At all events, the question of what should be allowed for depreciation, depletion and amortization reserve accruals involved a question of fact. "The amount necessary to be provided annually for this purpose is the subject of estimate and computation. * * * The calculations are mathematical but the predictions underlying them are essentially matters of opinion." *Lindheimer v. Illinois Bell Tel. Co.*, 292 U. S. 151, 167, 169.

The Commission's allowance for annual reserve accruals is based on the sinking fund method of reserve accounting. Defendant's estimate is based upon the straight line method of reserve accounting. The straight line method is the method employed by defendant over a period of approximately twenty-five years in its reserve accrual accounting (II, R. 1260). It is the method generally used and preferred for properties with units of varying life, such as those involved in this case. *Lindheimer v. Ill. Bell Tel. Co.*, 292 U. S. 151, 167-168. The Commission's

allowance amounts to approximately 2% of its total rate base. Defendant's estimates amount to approximately 5% of its estimate of the value of the property. See p. 115, *supra*.

Plaintiffs' witness Freese testified that upon the straight line basis his own estimate would amount to 4.205% of the reproduction cost new of the depreciable property and 3.09% of the total rate base (III, R. 1874).

In the final analysis, the weight that should be given an estimate or determination of annual accruals for depreciation, depletion and amortization must largely depend upon the qualifications and experience of the individuals making the estimate, the extent and accuracy of the available historical data and the interpretation of the data and their application to the property. Defendant's witness Connor was well qualified and thoroughly experienced. He had access to and analyzed an impressive amount of historical data (see pp. 115-117, *supra*). Plaintiffs' estimate would have provided for only 61.8% of the removals and replacements actually made by defendant up to the date of trial (III, R. 2000-2001). If plaintiffs' rate of accrual had been applied to the property in service at the date of inquiry, it would have been inadequate to meet actual requirements (III, R. 2027-2033). Plaintiffs' estimate was admittedly inadequate to meet the future mortalities unless supplemented by the existence and use of a credit balance in reserve account at the date of in-

quiry of \$5,000,000.00 for transmission lines alone (III, R. 1861).

It is well settled that the company may not be required to apply the depreciation fund accumulated out of past operations to make up inadequate allowances or deficits for the future. *Board of Public Util. Commrs. v. N. Y. Tel. Co.*, 271 U. S. 23.

It was for the jury to resolve the conflicting evidence on the subject and to weigh the opposing contentions and conflicts, and to pass upon the credibility of the witnesses. In doing so they had a right to reach a conclusion favorable to defendant. The evidence clearly supports such a conclusion. "The question of the amount which should be allowed annually for depreciation is a question of fact." *Clark's Ferry Bridge Co. v. Public Serv. Com.*, 291 U. S. 227. The jury had a right to say in the light of all the circumstances what amount should be allowed for annual reserve accruals. *Columbus Gas & Fuel Co. v. Pub. Utilities Comm. of Ohio*, 292 U. S. 398, 406.

Thirtieth Assignment of Error.

The Court of Civil Appeals erred in holding that defendant had failed to discharge the burden of proving by clear and satisfactory evidence that the prescribed rate was confiscatory in this: The evidence in respect to what would constitute a fair rate of return on the fair value of the defendant's properties was such as to clearly warrant the jury trying

the facts in the District Court to find that the prescribed rate would not yield a fair rate of return on the fair value of such properties.

(Submitted as a Proposition.)

**First Additional Proposition Under Thirtieth
Assignment of Error.**

The jury trying the facts in the District Court, having the power to determine all matters of weight and credibility, had the right to accept defendant's witnesses as against those of plaintiffs as to what would constitute a fair rate of return on the value of defendant's properties; and in deference to the verdict, it should be presumed that the jury accepted the testimony of defendant's witnesses on this.

Statement and Argument.

1. See Twenty-sixth ground of Motion for Rehearing; also Thirty-fifth ground of Supplemental Motion for Rehearing.

2. Much that the Court of Civil Appeals says on the question of what rate of return defendant should be permitted to receive has no application to the question. The Courts argument with respect to the return received or claimed to have been received by defendant under the 40c rate is immaterial. The issue in controversy is whether the *prescribed* rate

produces an adequate return. If the Commission's order, or the rate of return yielded by the rate which it prescribed, is confiscatory, the order is invalid regardless of what the 40c rate charged by defendant has hitherto produced. Even if the 40c rate was too high, that fact does not prove that the 32c rate is reasonable. Moreover, if the 6% return which the Commission claims its rate will produce, is not a reasonable return the order would fall for that reason alone.

As to what would constitute a reasonable rate of return defendant offered the testimony of two experienced bankers, R. L. Thornton, President of the Mercantile National Bank at Dallas, and Fred F. Florence, President of the Republic National Bank of Dallas. These two experienced bankers testified that based upon their knowledge and experience defendant should be permitted a return of not less than 8% per annum on the fair value of its property. They thought that this return would be necessary in order for defendant to attract a free flow of capital into its business, assure confidence in the financial soundness thereof, support and maintain its credit, and properly maintain its public service business. Each of these witnesses was familiar with the yields commonly and currently expected and demanded by investors in various classes of securities, including those of natural gas utilities. (Thornton, III, R. 1960-65; Florence, III, R. 1065-77). See *Bluefield W. W. & Imp. Co. v. Pub. Serv. Comm.*, 262 U. S. 679, 692-3.

Defendant's witnesses Connor and Biddison were familiar with the rates of return commonly expected, demanded and received by investors in natural gas utilities. Their opinion was that 10% per annum would be a reasonable rate of return. These opinions were based upon years of experience and a thorough knowledge of the factors essential to a rational conclusion on this subject. (Connor, II, R. 1324-30; Biddison, III, R. 2014.)

The only witness who testified for plaintiffs on rate of return was R. H. Montgomery, Professor in Economics in the University of Texas. This witness was inexperienced in the financing, construction, operation and management of natural gas properties (III, R. 1810). He was not familiar with defendant's business (III, R. 1811-13). He did not know what rate defendant was required to pay for the money which it obtained. He was not familiar with the current cost of money to any natural gas utility, and generally was unfamiliar with the natural gas business (III, R. 1821-25). He thought that defendant would be lucky to get any return at all during the year 1933, but that "if you are lucky, let us say, as far as one might have the temerity to guess, ten years—my opinion is that 5% * * * would be exceedingly liberal" (III, R. 1815-16).

It is plain that the only evidence introduced by plaintiffs on rate of return does not support the order. The witness Montgomery was not qualified to express an opinion, and what he said is obviously of no probative force. At all events, the triers of

fact had the right to reject his testimony and to accept the testimony given by defendant's qualified and experienced witnesses.

What annual rate of return will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment having regard to all relevant facts. It involves a determination of what rate of return will be reasonably sufficient to assure confidence in the financial soundness of the enterprise, and be adequate under efficient and economical management to maintain and support defendant's credit and enable it to raise the money necessary for the proper discharge of its public service duties. *Bluefield Waterworks & Improvement Co. v. Public Service Comm.*, 262 U. S. 679, 692, 693; *Los Angeles Gas & Elec. Corp. v. Railroad Commission*, 289 U. S. 287, 319, 320.

The nature of the business and the amount of risk involved is an important element to be considered in determining what rate of return a particular utility is entitled to receive. "One who invests his money in a business of a somewhat hazardous character is very properly held to have the right to a larger return, without legislative interferences, then can be obtained from an investment in government bonds or other perfectly safe security." *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 48. A natural gas pipe line company is generally regarded as the most hazardous of all public utilities. It is subject to the hazards attendant upon the production of gas

and its transportation to market. It must find a market in a highly competitive field. It competes with coal, fuel oil, electricity, and other fuel. The duration of the business is limited by nature, because the commodity in which a natural gas utility deals is supplied by nature alone. This is not true of any other public service business. *Wichita Gas Co. v. Pub. Serv. Comm.*, 2 F. Supp. 792, 810; *Oklahoma Nat. Gas Co. v. Corp. Comm.* (Okla.), 216 Pac. 917. The Texas Railroad Commission, in times past, has recognized that "undoubtedly a natural gas business stands out as a much more hazardous public utility business than that of any of the other public utilities." *Municipal Gas Co. v. City of Sherman*, P. U. R., 1925E, 67, 76.

A return of 8% or more for a natural gas utility has been held to be fair and reasonable. *Oklahoma Nat. Gas Co. v. Corp. Comm.*, 216 Pac. 917; *Okmulgee Gas Co. v. Corp. Comm.*, 220 Pac. 28; *McAlester Gas & Coke Co. v. Corp. Comm.*, 227 Pac. 83; *Wichita Gas Co. v. Public Serv. Comm. of Kansas*, 2 F. Supp. 792; *Community Nat. Gas Co. v. Roys City* (Texas), 7 F. Supp. 481, 7 P. U. R. (N. S.) 178; *Landon v. Public Util. Comm. of Kansas*, 242 F. 658; *United Fuel Gas Co. v. Pub. Serv. Comm.*, 14 F. (2d) 209, affirmed 278 U. S. 322, 73 L. Ed. 402; *Celina v. Public Util. Comm.*, 157 N. E. 72.

The Court of Civil Appeals cites no case which affirms a 6% return as being reasonable to a natural gas utility.

The Court of Civil Appeals does not rely upon evidence to support its conclusion that a 6% rate of return is reasonable. It relies upon certain cases which it cites. These cases cannot properly take the place of evidence on this fact issue. However, the cases cited do not support the Court's conclusion as applied to defendant. We now analyze these cases.

In *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, the rates of a company selling manufactured gas operating within the City of New York were involved. It is manifest that a company engaged in distributing and selling manufactured gas is subject to none of the hazards which confront defendant—a natural gas producing and transporting utility.

In *Bluefield Water Works & Imp. Co. v. Pub. Serv. Comm.*, 262 U. S. 679, 693, the Supreme Court observed, with respect to the Willcox case, that "the investment was held to be safe, return certain, and risk reduced almost to a minimum—as nearly a safe and secure investment as could be imagined in regard to any private manufacturing enterprise."

In *Cedar Rapids Gaslight Co. v. Cedar Rapids*, 223 U. S. 655, 670, the rates of a company distributing manufactured gas were involved. "In this case the Court fixed a value on the plant that considerably exceeded its cost, and estimated that, under the ordinance, the return would be *over 6%*." Here again the distinction between manufacturing enterprises and mining ventures should be considered.

In *Des Moines Gas Co. v. Des Moines*, 238 U. S. 153, the Court considered the reasonableness of a rate of 90c per thousand cubic feet charged for artificial gas in the City of Des Moines. This case is distinguishable because it involved a manufacturing concern, whereas the case at bar involves a concern engaged in the hazardous business of producing and transporting natural resources, its life and success depending upon wasting assets.

In *Stanislaus County v. San Joaquin & King's River C. & I. Co.*, 192 U. S. 201, the rates of a water company were involved. Manifestly, a water company is subject to none of the hazards to which this natural gas producing and transmission company is subject.

West Ohio Gas Co. v. Public Utilities Commission, 191 N. E. 105, cited by the Court of Civil Appeals, was reversed by the Supreme Court of the United States, 294 U. S. 63. Besides, it involved a distributing company and not a producing and transmission company.

Again, in *State ex rel Capital City Water Co. v. Pub. Serv. Comm. of Mo.*, 298 Mo. 524, 252 S. W. 446, the rates of a water company were involved.

It is interesting to note that in the *Bluefield* case, 262 U. S. 679, 693, the Supreme Court reviewed most of the cases cited by the Court of Civil Appeals in its opinion, and held that "under the facts and circumstances indicated by the record, we think that

a rate of return of 6% upon the value of the property is substantially *too low* to constitute just compensation for the use of the property employed to render the service." It must be remembered that "each utility presents an individual problem." *Driscoll v. Edison L. & P. Co.*, 83 L. Ed. Adv. Ops. 677. And that "what will constitute a fair return in a given case is not capable of exact mathematical demonstration. It is a matter more or less of approximation about which conclusions may differ. The Court in the discharge of its constitutional duty on the issue of confiscation must determine the amount to the best of its ability in the exercise of a fair, enlightened and 'independent judgment as to both law and facts'." *United Rys. & L. Co. v. West*, 280 U. S. 234, 251. And that a natural gas producing and transmission company is generally regarded as entitled to higher rates of return than other types of utilities because of the hazards of the business in which it is engaged. See authorities, pp. 187-8, *supra*.

Moreover, the rates of yield on investments in bonds, plus brokerage, are substantially less than the rate of return required to constitute just compensation for the use of property in public service. *McCardle v. Indianapolis Water Co.*, 272 U. S. 400, 419. "Certainly the yields of equity issues must be larger than that for the underlying security." *Driscoll v. Edison Light & Power Co.*, 83 L. Ed. Adv. Ops. 677.

What constitutes a fair rate of return is primarily the subject of expert testimony. And we think it

perfectly clear that this question of fair return presented an issue of fact to be determined in the District Court by the triers of fact. There was opinion evidence on both sides. The issue was settled by determining credibility of the witnesses and the weight to be given their testimony—functions assigned exclusively to the triers of fact. As to testimony of expert witnesses, it is the general rule that such testimony has “no such commanding quality as to apply coercion to the judgment of the appointed triers of facts, and exclude every choice but one.” *Dayton Power & Light Co. v. Commission*, 292 U. S. 290, 301, per Mr. Justice Cardozo.

That the testimony of defendant’s experts, if accepted, constituted clear, definite and satisfactory evidence of confiscation cannot be denied. And with this conflict in the testimony of these witnesses resolved in favor of defendant, the rate was shown by “clear and satisfactory” evidence to be confiscatory even on the basis of the Commission’s own findings as to rate base, operating revenues and expenses, and other relevant factors.

Thirty-first Assignment of Error.

The Court erred in holding, in effect, that defendant’s developed and producing gas reserves should not be included in the rate base at defendant’s appraised value therefor.

Thirty-second Assignment of Error.

The Court erred in holding, in effect, that the proper method for determining the value of defendant's developed and producing gas reserves was to allow the field price for the gas actually produced therefrom during the years in question.

Thirty-third Assignment of Error.

The Court of Civil Appeals erred in criticizing the defendant's method of determining the value of its developed leaseholds, and especially erred in that portion of its opinion where it approved what it calls the Commission's "more simple and direct method of handling production costs and properties by allowing the full value of the gas at the well head at the current market price on an annual or current basis, which was shown to be a proper method of determining such matters."

Thirty-fourth Assignment of Error.

The Court of Civil Appeals erred in holding, in effect, that the trial court and jury were required to accept the Commission's method or formula of "handling production costs and properties by allowing the full market value of the gas at the well head at the current market price," and that the trial court and jury had no right, in lieu of using such formula,

to ascertain and determine from the evidence the actual reasonable and fair value of defendant's production properties and system and the actual operating costs and revenues connected therewith.

Statement and Argument.

1. See Thirty-fourth and Thirty-fifth grounds of Motion for Rehearing; also Thirteenth ground of the Supplemental Motion for Rehearing.

2. At page 10 of its opinion the Court criticizes the defendant's method of determining the value of developed leases. It approves the Commission's "more simple and direct method of handling production costs and properties by allowing the full value of the gas at the well head at the current market price on an annual or current basis, which was shown to be a proper method of determining such matters." Here the Court is clearly in error. The Commission did not employ the method of allowing the well-head price for the gas produced in determining the value of developed leases. What the Commission did in respect of developed leaseholds is clearly set forth at pages 69-72, Volume I of the Record. The method adopted is referred to as "method 2." It is true that the Commission refers to other methods for evaluating producing leaseholds, but the method actually adopted was method 2. The Commission states: "In finding the present worth of developed leaseholds on an actual cost basis, Mr. Freese deducted from the original cost (\$967,804.73) *which we have adopted,*

the percent of depletion which has taken place since the leaseholds were acquired." (I, R. 71.) It is, therefore, apparent that the Commission took the actual cost of undeveloped leaseholds and deducted depletion therefrom in arriving at their value. This method, of course, deprived the defendant of the difference between the price it paid for an undeveloped lease and the enhanced value of that lease after a well had been drilled thereon.

The method to which the Court of Civil Appeals refers, that is, allowing the well-head price for the gas produced from defendant's own reserves, was the method followed by the witness Freese in the District Court. It was not the method adopted by the Commission in its opinion and order. Here the Court of Civil Appeals substitutes its judgment for that of the Commission as to the method of evaluating producing leases; and this is so although the Court criticizes and refuses to follow the rule which would permit the District Court to exercise an independent judgment as to law and facts on the confiscation issue.

It is clear that such a method as the Court of Civil Appeals advocates ignores the fundamental rule of rate-making which permits the utility to earn a reasonable return on the fair value of the property employed in the public service. Whether a particular rate allows a reasonable return can be determined only by ascertaining the fair value of the property, operating expenses and other pertinent factors. This is the only accurate and legal method for determining whether the rate provides a reasonable

net return on the fair value of the property. The effect of the method approved by the Court of Civil Appeals is illustrated by what plaintiffs' witness Freese did in the District Court trial. He eliminated all production system property, operating expenses and depreciation expenses. He allowed the well-head price for the gas produced from defendant's own gas reserves. His method lacked \$426,219.60 per annum of providing actual operating expenses, depreciation, depletion and a 6% return on the actual cost of the Texas production system properties.

Moreover, if the well-head price for the gas produced is taken as a measure of value, then the value of the property would vary yearly according to the amount of gas withdrawn from the gas reserves. Thus in cold years, when more gas is withdrawn, the properties would have a much higher value than in the warmer years, although the property would be identical and would, in fact, be worth no more during the cold years than during the warm years. There is no law which sanctions the theory that the compensation of a utility should be controlled by the extent to which its property is used. No rational argument can be advanced for the adoption of such a principle in rate-making.

The Court of Civil Appeals sets out a table which it asserts represents the "annual expenses in connection with the production of gas" as claimed by defendant (Opinion, p. 41). The court then concludes that if these expenses are considered in relation to

the amount of gas produced from defendant's own gas reserves during the year 1933, it would require an average price in the field of 29.37c per thousand feet of gas. It is apparent that the so-called expenses set out by the Court are not in fact production expenses. The production system expenses were \$105,554.86 for the year 1933, as shown in defendant's Exhibit 8 (III, R. 2215). Canceled and surrendered lease expense, set out by the court, has nothing to do with the production of gas. It relates to undeveloped leases. What the Court actually sets out is not annual expenses in connection with the production of gas, but annual expenses plus depreciation and depletion and return on the fair value of the production system property, which consists of leaseholds, gas wells, production system structures, production system equipment, general supervision and undistributed general costs, all of which were appraised by defendant in the amount of \$9,141,858.05 (IV, R. 2364).

But the vice in the Court's opinion runs much deeper. As the table of gas sales and purchases amply illustrates, defendant purchases most of its gas. Its own gas reserves are needed in periods of peak demands and when the amount of gas available to it from other sources is inadequate to supply the demands of its consumers. It is manifestly incorrect, therefore, to measure the value of defendant's reserves by the volume of gas produced from them during any one year. Defendant is a public service corporation. It must meet the demands of its consumers regardless of the expense involved.

In order to meet these demands it must provide a gas supply of its own so that when the independent producers, over whom defendant has no control, fail to provide sufficient quantities to meet the public demand, the public service will not be interrupted. In the natural gas business peak demands occur infrequently. Moreover, the defendant cannot anticipate in advance what the peak demand will be. The peak demand depends upon weather conditions which are beyond defendant's control. And the amount of gas which can be taken from a given field depends upon the pipe line and other facilities available to that field. It also depends upon what portion of the system the consumers' demands are imposed. Gas reserves, like pipe lines, must be more than adequate to meet the average demands of the consumers in order that they may be adequate to meet the peak demands. A portion of the capacity of pipe lines is idle in periods of off-peak demands. Thus, on an average the full line capacity is not used, but no one would contend that their value should be reduced or determined according to the amount of gas transported. Defendant maintains compressor stations which are used only during a portion of each year. They are used to raise the pipe line pressures in periods of peak demand but they are idle in periods of off-peak demand. Certainly the value of these stations cannot be measured by the extent of their use. Their existence and operation are essential to the public service and yet they are used only during a portion of the year. A natural gas public utility upon which rests the responsibility of supplying a public service to thousands of consumers should not

be at the mercy of independent gas producers over whom it has no control whatever. Good management dictates that the defendant protect its public service business by acquiring and holding at all times a supply of gas adequate to protect the public service from interruption. What is adequate is a question primarily for the management—those charged with operating the business and responsible for its success or failure—to decide.

As a basis for its computations the Court of Civil Appeals selected the year in which defendant's gas sales were the lowest during any period from 1927 through 1934 inclusive. This is apparent from the table set forth at page 30 of the Court's opinion. At least, the Court should have used the average production for this period.

Defendant's producing reserves although not used to capacity continuously are, nevertheless, dedicated to and useful in the public service *continuously*. Regardless of the extent of the use in a given year the whole property, the entire value thereof, is *dedicated* to the rendition of the public service. The *capital invested* in these gas reserves is *devoted* to the public service *continuously*. It is not free capital, and because it is *devoted* to the public service *at all times* defendant is entitled to receive a fair return thereon.

The commission included the developed reserves at cost, less depletion. They may be included in the rate base at this figure without affecting defendant's

showing that the challenged rate order is confiscatory, as witness the tables set forth at pages 123, 125, *supra*, in which the developed gas reserves, as well as the undeveloped reserves, have been included in the rate base at actual cost.

VI.

RULINGS AS TO ALLEGED TRIAL ERRORS.

Thirty-fifth Assignment of Error.

The Court of Civil Appeals erred in holding that the District Court erred in its charge wherein it defined the term "used and useful."

Thirty-sixth Assignment of Error.

The Court of Civil Appeals erred in holding, in effect, that defendant was not entitled to have the jury consider for any purpose the book cost of its Petrolia field properties in arriving at the fair value of all of its properties used and useful in the public service.

Thirty-seventh Assignment of Error.

The Court of Civil Appeals erred in holding, in effect, that the defendant was not entitled to have

the jury consider the book cost of its undeveloped gas leaseholds in determining the fair value of all of its properties used and useful in the public service.

Thirty-eighth Assignment of Error.

The Court of Civil Appeals erred in holding that the charge of the District Court "necessarily directed the jury" that in determining a proper rate base it should take into consideration the valuation of \$7,436,650.00, placed by defendant upon its developed and producing leaseholds.

First Proposition Under Thirty-fifth to Thirty-eighth Assignments of Error.

This case, as it was submitted to the jury, involved the issue of confiscation of property, in violation of the Due Process Clause of the Fourteenth Amendment to the Federal Constitution. What constitutes a proper submission of the issue of confiscation in such a case is a Federal question, upon which the decisions of the Supreme Court of the United States furnish controlling authority. This being true, and the Supreme Court of the United States having already held that the issue of confiscation was properly submitted to the jury, the Court of Civil Appeals clearly erred in holding that said issue was improperly submitted to the jury.

Second Proposition Under Thirty-fifth to Thirty-eighth Assignments of Error.

The Railroad Commission having found that something should be included in the rate base on account of the Petrolia field properties, and the only question being whether the value of said properties should be arrived at on a salvage basis or a book cost basis, the holding of the Court of Civil Appeals in this connection is clearly erroneous. The Court's charge did not require the jury to assign any particular value to the Petrolia field properties or to arrive at the value under any particular method. This being true, and the Railroad Commission having found that said properties should be included in the rate base in an amount equal to their salvage value, the charge was not erroneous in its application to the Petrolia field properties.

Third Proposition Under Thirty-fifth to Thirty-eighth Assignments of Error.

The Railroad Commission having found that defendant was entitled to have a valuation of its undeveloped gas leaseholds included in the rate base, and having further found, in effect, that said undeveloped gas leaseholds were used and useful in the public service, the definition of "used and useful" was not erroneous because of the fact that the jury were merely permitted to include in the rate base what they found to be proper valuation for the undeveloped gas leaseholds. The jury were not required by

the charge to include any particular value or to apply any particular method in arriving at the value of these properties. This being true, and the Railroad Commission having found that these properties were used and useful in the public service, the charge was not erroneous in permitting the jury to include a proper valuation of these properties in the rate base.

Statement and Argument.

1. See Thirty-first, Thirty-second, Thirty-third and Thirty-fourth grounds of the Motion for Rehearing.

2. To avoid unduly extending the length of this application, the defendant adopts the Statement, Authorities and Argument presented on this question in its "Brief for Appellee," filed in the Court of Civil Appeals, pages 51 to 67, inclusive.

Thirty-ninth Assignment of Error.

The Court of Civil Appeals erred in holding that the District Court erred in permitting the defendant's witness Connor to testify, in effect, that he knew the rate of return the Railroad Commission had always fixed for gas utilities and that the rate had never been fixed below 7 per cent.

(Submitted as a Proposition.)

Statement.

1. See Thirty-sixth ground of Motion for Re-hearing.

2. The witness Connor testified that he was familiar with the rates commonly expected, demanded and received by investors in public utilities enterprises and that they, in general, regard the natural gas business as the most hazardous of public utilities (S. F., 2053-4). The witness then proceeded to demonstrate this fact by showing the average yield to maturity of numerous first mortgage bonds of representative utilities throughout the United States (S. F., 2055-6). All of which evidence was admitted without objection.

The witness was then permitted to testify that 7 per cent was the lowest net annual rate of return which had theretofore been fixed by the Railroad Commission in connection with its determination of rates for natural gas service (S. F., 2063).

The objection made to this was that the present case was the only one involving pipe line rates.

Authorities.

Bluefield Water Works & Imp. Co. v. Public Service Commission, 262 U. S. 679;

Indiana Bell Tel. Co. v. Public Service Commission, 300 Fed. 190;

Los Angeles Gas & Elec. Corp. v. Railroad Commission, 289 U. S. 287;

New York Tel. Co. v. Prendergast, 300 Fed. 822;

New York & Richmond Gas Co. v. Prendergast, 10 Fed. (2d) 167;

Smith v. Illinois Bell Tel. Co. 282 U. S. 133;

United R. & Elec. Co. v. West, 280 U. S. 234.

Argument.

The evidence here complained of was clearly relevant and admissible. The fact that this case involved a pipe line rate, as distinguished from a distributing rate, goes, not to the admissibility of the evidence, but to its weight. The objection to this evidence raised no more than a point of argument to be considered by the jury.

We also adopt the discussion presented in the "Brief for Appellee," filed by defendant in the Court of Civil Appeals, pp. 67-22, incl.

Fortieth Assignment of Error.

The Court of Civil Appeals erred in holding that the District Court erred in failing to exclude from evidence Volumes 7 and 8 of defendant's Exhibit 28, presented by defendant's witness Connor.

First Proposition Under Fortieth Assignment of Error.

The action of the trial court in admitting in evidence Volumes 7 and 8 of defendant's Exhibit 28, if error, is not ground for reversal because the record discloses that thereafter the witness Connor was permitted to give the same evidence orally, and the same matter was thereby placed before the jury without objection.

Second Proposition Under Fortieth Assignment of Error.

If it be true that a part of the material presented in these volumes was objectionable, that fact is immaterial, because the inadmissible part, if any, was not separately objected to. The objections were general and raised only the point that the material presented in these two volumes was inadmissible as a whole.

Statement.

1. See Thirty-seventh ground of the Motion for Rehearing filed in the Court of Civil Appeals.

2. Connor's oral testimony, admitted without objection, covered and presented all of the details contained in Volumes 7 and 8 of defendant's Exhibit 28. The details are given in the "Brief for Appellee,"

filed by defendant in the Court of Civil Appeals, and, to avoid extending the length of this application unduly, page reference is made to that brief (pages 99-114, incl.). We adopt also the Argument and Authorities there presented.

Forty-first Assignment of Error.

The Court of Civil Appeals erred in holding that the District Court erred in failing to exclude from evidence Exhibit 42, prepared by defendant's witness Connor.

First Proposition Under Forty-first Assignment of Error.

The action of the trial court in admitting this exhibit in evidence does not constitute reversible error because this exhibit constituted a mere detailed elaboration of the same facts presented in defendant's Exhibit 41, which was admitted in evidence without objection. Furthermore, the same facts were brought out in the oral direct and cross examination of the witness Connor without objection.

Statement and Argument.

1. See Thirty-eighth ground of Motion for Rehearing.

2. To avoid unduly extending the length of this application, we here adopt, by page reference, the statement and discussion presented in the "Brief for Appellee," filed by defendant in the Court of Civil Appeals, pages 114 to 118, incl.

Forty-second Assignment of Error.

The Court of Civil Appeals erred in holding that the District Court erred in failing to exclude from evidence defendant's Exhibits 4 to 14, both inclusive, prepared by defendant's witness Hulcy.

First Proposition Under Forty-second Assignment of Error.

The exhibits here referred to were mere accounting exhibits presenting facts that could not have been presented in any other manner and they were clearly admissible.

Statement and Argument.

1. See the Thirty-ninth ground of Motion for Rehearing.

2. It is obvious that the exhibits here in question were mere accounting computations such as are commonly admitted in evidence. The facts shown in these exhibits could not have been placed before

the court and jury in any other manner. We adopt the statement and discussion presented in the "Brief for Appellee," filed in the Court of Civil Appeals by defendant, pages 118 to 120.

Forty-third Assignment of Error.

The Court of Civil Appeals erred in holding that the District Court erred in failing to exclude from evidence defendant's Exhibit 32, prepared by its witness Steinberger.

First Proposition Under Forty-third Assignment of Error.

The Railroad Commission having found that defendant's undeveloped leaseholds were used and useful, and the only issue involved being an *issue of value*, this exhibit was admissible on that issue. Furthermore, defendant's witness Biddison, testified, without objection, to facts showing that these properties were used and useful; and plaintiffs' witness Phillips included the book cost of these same properties in his exhibits, which were admitted in evidence.

Statement and Argument.

1. See Fortieth ground of Motion for Rehearing.
2. We adopt here the Statement, Authorities and

Argument presented in the "Brief for Appellee," filed by defendant in the Court of Civil Appeals, pages 121 to 124, inclusive.

Forty-fourth Assignment of Error.

The Court of Civil Appeals erred in holding that the argument of counsel for the defendant, referred to on page 12 of the Court's opinion, was improper and prejudicial.

First Proposition Under Forty-fourth Assignment of Error.

The argument of the defendant's attorney here complained of was not improper, inflammatory or outside the record. And such argument having been made in reply to argument made by counsel for plaintiffs, the same did not constitute material or reversible error; and especially is this true inasmuch as plaintiffs did not object to such argument at the time it was made.

Statement.

1. See Forty-first ground of Motion for Rehearing.
2. The argument of counsel was first complained

of in the amended motion for new trial (Tr., 537, 538, 545).

3. It very clearly appears that the argument complained of was in reply to argument made by counsel for the plaintiffs. The details appear in the "Brief for Appellants," filed in the Court of Civil Appeals, pages 121-124. To avoid extending the length of this application unduly, page reference is made to that statement.

Authorities and Argument.

The argument complained of clearly falls within the rule requiring that exception must be taken at the time the argument is made, unless the argument is so improper and so inflammatory and prejudicial that an admonition by the Court to the jury would be unavailing. It falls within the general rule that "a case will not be reversed on account of improper argument before a jury unless objection is interposed at the time the argument is made." *City of Pampa v. Todd*, 59 S. W. (2d) 114; *Railway Company v. Green*, 37 S. W. (2d) 123; *Robbins v. Wynne*, 44 S. W. (2d) 946, 949.

VII.

OTHER ERRORS COMPLAINED OF.

Forty-fifth Assignment of Error.

The Court of Civil Appeals erred in failing to hold that the rate was confiscatory upon the basis of the

Commission's own findings and the actual experience of the company for the years 1931, 1932, 1933, and the twelve months ended March 31, 1934.

Forty-sixth Assignment of Error.

The Court of Civil Appeals, having approved the findings of the Commission, erred in failing to hold, upon the basis of such findings, that the prescribed rate was shown to be confiscatory.

(Submitted as Propositions.)

Statement and Argument.

See Ninth and Eleventh grounds of Supplemental Motion for Rehearing.

See statement and argument heretofore presented, pp. 103-132.

Forty-seventh Assignment of Error.

The Court of Civil Appeals erred in its opinion in stating that "the rate order was attacked by both pleadings and evidence as being unreasonable, unjust and confiscatory because not supported by substantial evidence." If by such statement the Court meant that the defendant assailed the rate order as being confiscatory only "because not supported by

substantial evidence," such statement, thus interpreted, is clearly erroneous and wholly unsustained by the record.

(Submitted as a Proposition.)

Statement and Argument.

See Tenth ground of the Motion for Rehearing.

Defendant did not assail the rate order merely because it was "not supported by substantial evidence." By its pleadings and by its evidence defendant tendered the independent issue that the rate order in its actual application to its property and business was *confiscatory*.

Forty-eighth Assignment of Error.

The Court of Civil Appeals erred in holding that if a rate order of the Commission is based upon substantial evidence "it is manifestly neither unreasonable, unjust nor confiscatory"; and especially erred in holding that if the order is based upon substantial evidence, it, as a matter of law, is not confiscatory.

(Submitted as a Proposition.)

Statement and Argument.

See Third ground of Supplemental Motion for Rehearing.

The issue of confiscation involves an inquiry as to the manner in which the prescribed rate actually applies to the property and business of the affected utility. This inquiry is judicial in nature. That the legislative or administrative agency may hear substantial evidence supporting the rate, considered in the light of legislative standards, does not eliminate the possibility of there being produced before a judicial tribunal, later conducting an inquiry on the issue of confiscation, "clear and satisfactory" or "clear and convincing" evidence showing that the rate is confiscatory.

Forty-ninth Assignment of Error.

The Court of Civil Appeals erred in adopting and approving, in effect, the Commission's rate base of \$46,246,617.53, as representing the fair value of defendant's over-all properties.

(Submitted as a Proposition.)

Statement and Argument.

See Tenth ground of Supplemental Motion for Rehearing.

The evidence relating to this point has already been fully reviewed.

Fiftieth Assignment of Error.

The Court of Civil Appeals erred in approving and adopting, in effect, the Commission's allowance for depreciation.

(Submitted as a Proposition.)

Statement and Argument.

See Twenty-fifth ground of Supplemental Motion for Rehearing.

The evidence relating to the depreciation allowance has already been fully reviewed.

Fifty-first Assignment of Error.

The Court of Civil Appeals erred in holding that defendant was not entitled to any allowance in the rate base on account of going concern value.

(Submitted as a Proposition.)

Statement and Argument.

See Twenty-ninth ground of the Supplemental Motion for Rehearing.

In discussing this subject the Court of Civil Appeals, on page 36 of its opinion, refers to the testimony of the witness Freese and especially his testimony to the effect that he "had appraised the Company's properties at their full value as a going concern in full business operation." Mr. Freese did not testify at all as to the "going concern value" of the over-all integrated properties except before the Commission. He gave no testimony on this subject before the reviewing court. The same applies to his testimony in respect to "reproduction cost new basis" and the other items referred to by the Court on page 36 as being covered by his testimony.

Fifty-second Assignment of Error.

The Court of Civil Appeals erred in finding and holding that the cost actually incurred by the company for "preliminary and organization expense" was less than \$232,000.00.

(Submitted as a Proposition.)

Fifty-third Assignment of Error.

The Court of Civil Appeals erred in adopting the Commission's allowance for interest during construction.

Fifty-fourth Assignment of Error.

The Court of Civil Appeals erred in approving and adopting the Commission's allowance for taxes during construction.

Fifty-fifth Assignment of Error.

The Court of Civil Appeals erred in holding "the items of 'General Supervision Allocated' and 'Undistributed General Costs' are speculative, visionary, imaginary, and are purely hypothetical expenses of financing the reproduction of a business, which finds no support whatever in the history or experience of the appellee Gas Company, and do not constitute clear and satisfactory evidence of such expenses or values." (Opinion, p. 41.)

Statement and Argument.

See the Twenty-eighth, Thirtieth, Thirty-first and Thirty-second grounds of Supplemental Motion for Rehearing.

Fifty-sixth Assignment of Error.

The Court of Civil Appeals erred in basing its decision that the Commission's order was valid on the facts and calculations shown in Table I attached to the Court's opinion for the reason that the said table

adopts and presents a rate base less than the fair value of the company's public service properties as shown by the uncontradicted evidence introduced on the trial in the District Court, and because said table adopts an allowance for accruals to reserves for depreciation, depletion and amortization shown by the evidence to be wholly inadequate.

Statement and Argument.

See Thirty-fourth ground of Supplemental Motion for Rehearing.

These tables are further erroneous because they give no effect to any of the evidence introduced by the company and give conclusive effect to evidence submitted by the witnesses of the Commission even where such evidence is in conflict with the Commission's findings.

Fifty-seventh Assignment of Error.

The Court of Civil Appeals erred in holding that 6 per cent was a fair rate of return on defendant's public service properties.

Statement and Argument.

See Thirty-fifth ground of Supplemental Motion for Rehearing.

We adopt the discussion already presented relating to "fair rate of return," *supra*, pp. 183-191.

Fifty-eighth Assignment of Error.

The Court of Civil Appeals erred in finding and holding that the validity of the 32c city gate rate prescribed by the Railroad Commission was conclusively established by the evidence as a matter of law.

(Submitted as a Proposition.)

Statement.

1. See Forty-second ground of the Motion for Rehearing.

2. We adopt here the Statement and Argument, relating to the same question and presented in another connection, *supra*, pp. 103-159.

Fifty-ninth Assignment of Error.

The Court of Civil Appeals erred in reversing the judgment of the District Court, and in rendering final judgment dissolving the injunction granted by the District Court and declaring the rate order of

the Railroad Commission to be just, reasonable, non-confiscatory and valid in every respect.

(Submitted as a Proposition.)

**First Additional Proposition Under Fifty-ninth
Assignment of Error.**

For all of the reasons hereinbefore pointed out, we respectfully submit that the action of the Court of Civil Appeals here complained of was clearly erroneous as a matter of law. The Court's holding, properly viewed, necessarily involves a denial of the right of the District Court, to determine any issue of fact in a case like this. The Court's opinion denies the possibility of the existence of an issue of fact in such a case.

We submit that it was at least error for the Court of Civil Appeals to *render* final judgment, instead of *remanding* the case to the District Court for another trial.

Sixtieth Assignment of Error.

The Court of Civil Appeals erred in considering the average return for the years 1927 through March 31, 1934, as the basis for a holding that the prescribed rate was not confiscatory.

Sixty-first Assignment of Error.

The Court of Civil Appeals, having adopted the average return for certain years as to the test to be applied in determining issue of confiscation, erred in adding hypothetical returns of \$513,768.97 for the year 1933 and \$313,018.52 for the year ended March 31, 1934, to the actual revenues of the company.

Statement and Argument.

1. See Seventh and Eighth grounds of the Supplemental Motion for Rehearing.
2. For discussion of the questions here raised see *supra*, pp. 138-144.

Sixty-second Assignment of Error.

The Court of Civil Appeals erred in holding, in effect, that the Supreme Court of the United States did not determine the sufficiency of the over-all evidence to support the finding of the "triers of fact" in the State trial court to the effect that the rate order in question was unjust, unreasonable and confiscatory.

Statement.

See Eleventh ground of Motion for Rehearing.

We here adopt by reference the Statement and Argument presented under Assignments of Error Ten to Thirteen, inclusive, *supra*, pp. 83-97, incl.

It is now submitted that, in making each of the rulings complained of in this application and in sustaining the rate order of the Railroad Commission as being nonconfiscatory, as against the defendant's challenge of its validity grounded upon the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, the Court of Civil Appeals has denied to the defendant due process of law and deprived it of its property and of the value of its property without due process of law, in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. It is further submitted that the enforcement of said rate order as against the defendant, after it has obtained only such limited judicial review of the order and judicial determination of the properly tendered issue of confiscation as has been outlined by the Court of Civil Appeals, will deny the defendant due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

The defendants in error (hereinbefore designated as plaintiffs) are represented herein by Honorable Gerald C. Mann, Attorney General of Texas, and Honorable Hugh Q. Buck, Assistant Attorney General, both of whom reside at Austin, Texas. They have been notified in writing of the filing of this Application for Writ of Error and a duplicate copy

of same has been deposited with the clerk for their use on demand.

This Application for Writ of Error is submitted with the prayer that the same be granted and that the writ of error issue herein directed to the Court of Civil Appeals for the Third Supreme Judicial District of Texas, at Austin, and that upon return of the writ and a hearing of this cause, the judgment of the Court of Civil Appeals be reversed and that of the District Court be affirmed, and for such other relief as plaintiff in error may be entitled to receive under the law and facts.

Respectfully submitted,

ROY C. COFFEE,
MARSHALL NEWCOMB,
Dallas, Texas,

OGDEN K. SHANNON,
Fort Worth, Texas,

BEN H. POWELL,
BLACK, GRAVES & STAYTON,
Austin, Texas,

Attorneys for Plaintiff in
Error.

Lone Star Gas Company.

EXHIBIT "G"

**CLERK'S OFFICE, SUPREME COURT
OF TEXAS**

Order Granting Application for Writ of Error

November 22, 1939

LONE STAR GAS COMPANY

App. No. 24,384

v.

STATE OF TEXAS ET AL

From Travis County 3d District

This day came on to be heard the application of Plaintiff in Error, for a writ of error to the Court of Civil Appeals for the Third District, and the same having been duly considered, it is ordered that the application be granted, and the writ of error issue as prayed for upon the filing by applicant of a bond in the sum of \$5,000.00 conditioned to pay the costs of this Court, the Court of Civil Appeals and District Court, payable to the adverse party, as prescribed by law.

EXHIBIT "H"

No. 7664

LONE STAR GAS COMPANY
Plaintiff in Error

v.

STATE OF TEXAS ET AL
Defendants in Error
From Travis County
Third District

This is a gas utility rate case. As it reaches us it involves principally the question of confiscation. The case has had a rather checkered career, as will appear from the opinion which follows:

It appears that after a very extended hearing before it and its agencies, duly constituted, the Railroad Commission of Texas, hereinafter called the Commission, entered an order fixing a gas rate of 32c to be applied at all city gates of cities in Texas served by the Lone Star Gas Company.

Very shortly after the above gas rate order was promulgated by the Commission, the Gas Company filed a suit in the United States District Court at Austin, Texas, attacking the above rate order and seeking to enjoin its enforcement upon the ground,

generally stated, that it was confiscatory as applied to the properties and business of the Gas Company, and therefore violative of the Equal Protection clause and the Due Process of Law clause of the Fourteenth Amendment to the Federal Constitution, and of similar guaranties contained in the Bill of rights of the Texas Constitution. In addition to the constitutional ground of attack above mentioned, the Gas Company attacked the rate order in the United States District Court as unreasonable and unjust as applied to its properties and business in this State.

In addition to the attacks above detailed, the Gas Company attacked the above rate order in the United States District Court on the alleged ground that it was engaged in interstate commerce in its business and operations in transporting and selling gas in Texas and Oklahoma, and therefore the Texas Railroad Commission was without jurisdiction in the premises. This attack has been overruled by the United States Supreme Court, and will not be further referred to. *Lone Star Gas Co. v. Texas, et al*, 304 U. S. 224.

After the above-mentioned suit was filed in the United States District Court at Austin, the State of Texas and the Railroad Commission filed this suit in a state district court in Travis County, Texas, claiming the right to have the matters presented to the United States District Court by the Gas Company litigated and determined by a state court. By their petition in the state court the State and the Railroad Commission, who will hereinafter be referred to as

the State, prayed that the Gas Company be restrained from violating the gas rate order above described. Also, the State prayed that it be enjoined from enforcing such rate order pending final judgment.

After the filing of the suit in the state court that court entered the order prayed for by the State staying the enforcement of this gas rate order pending final judgment. Also, the federal district court entered an order restraining the above rate order pending final judgment in the state courts. So far as we know, the case in the United States District Court is still pending there awaiting the action of the state courts in this case. We shall not again refer to the case pending in the federal district court.

After the happening of the above events all parties appeared in the state district court and filed pleadings and joined issues. The Gas Company properly assumed the role of plaintiff, and the State properly assumed the role of defendant. The Gas Company attacked this rate order in the state court on substantially the same grounds that it had theretofore attacked same in the United States District Court. The case in the state district court, which is this case, was finally tried in such court, where it was submitted to a jury on one special issue. The jury answered this special issue in favor of the Gas Company, and based on such answer the district court entered a judgment annulling the above gas rate order, and permanently enjoining its enforcement.

The State appealed the above judgment to the

Court of Civil Appeals for the Third District, at Austin. On final hearing in that court the judgment of the district court was reversed, and judgment rendered for the State, in all things upholding the above gas rate order. *State v. Lone Star Gas Co.*, 86 S. W. (2d) 484.

In due time the Gas Company made application to this Court for writ of error. Such application was duly considered by this court, and "REFUSED."

After the application for writ of error had been finally refused by this Court, the Gas Company appealed to the United States Supreme Court from the judgment and opinion of the Court of Civil Appeals. The appeal was granted, and on final hearing in the United States Supreme Court the judgment of the Court of Civil Appeals was reversed, and the cause remanded to that court for further proceedings "not inconsistent with" the opinion of the United States Supreme Court. *Lone Star Gas Co. v. Texas*, 304 U. S. 224.

After the happening of the above events the case was again briefed and argued in the Court of Civil Appeals, and that court again rendered judgment, as it had in the first instance, reversing the judgment of the district court and rendering judgment for the State, in all things upholding the gas rate order here under attack. *State v. Lone Star Gas Co.*, 129 S. W. (2d) 1164.

Lone Star Gas Company again applied to this court

for writ of error, and such writ was granted. The case has been duly briefed, argued, and submitted in this Court.

In its original opinion, from which the appeal was prosecuted to the United States Supreme Court, the Court of Civil Appeals made numerous rulings on law questions presented to it in that appeal. At this point we deem it expedient to state certain of these rulings.

1. As we interpret the first opinion of the Court of Civil Appeals, it holds that the statutory appeal provided by Article 6059, R. C. S. 1925, the statute under which this case was appealed from the Railroad Commission to the district court, "to determine whether a rate order is unreasonable and unjust" contemplates a "de novo" trial in the district court, as contradistinguished from a trial which "may mean merely the correction of a nonpermissible error." In order that this opinion may clearly reflect the original holdings of the Court of Civil Appeals on the question as to the kind and character of trial contemplated by Article 6059, *supra*, in cases of this kind, we quote the following from that opinion:

"The rate fixed by the commission is presumed to be valid, reasonable, and just until it is declared otherwise by a court of competent jurisdiction. *R. R. Com. v. Uvalde Construction Co.* (Tex. Civ. App.) 49 S. W. (2d) 1113. In order to overcome this presumption in favor of the validity of the rate on the constitutional ground of confiscation, the burden of proof rests heavily

upon appellee. *Dayton P. & L. Co. v. Pub. Utilities Comm.*, 292 U. S. 290, 54 S. Ct. 647, 78 L. Ed. 1267. And in order to set aside the rate as being unreasonable and unjust, article 6059 requires that appellee show by clear and satisfactory evidence that such rate is unreasonable and unjust as to it. A controversy immediately arises as to the proper interpretation to be given these rules and statutory requirements as to the burden and quantum of proof. The commission contends that the rate must be sustained against the attack that it is confiscatory and unreasonable and unjust, because it does not allow a reasonable return on the fair value of the property, when it is shown to be based upon substantial evidence adduced before the commission, and that only the evidence adduced before the commission on the rate hearing may be considered on appeal to the court. On the other hand, appellee contends that the hearing on appeal to the court of such issues is *de novo*, and that 'due process of law requires submission to a judicial tribunal for determination upon its own independent judgment as to both law and facts, according to the settled rules governing judicial action and decision.' *Otis Elevator Co. v. Indus. Comm.*, 302 Ill. 90, 134 N. E. 19, 21; *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287, 40 S. Ct. 527, 64 L. Ed. 908; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 363, 14 S. Ct. 1047, 38 L. Ed. 1014. As regards the rate-making power of the commission, the Texas courts have adopted this wider scope of review. *R. R. Com. v. H. & T. C. R. R. Co.*, 90 Tex. 340, 352, 38 S. W. 750; *R. R. Comm. v. Weld & Neville*, 96 Tex. 394, 403, 73 S. W. 529; *Gulf, C. & S. F. Ry. Co. v. R. R. Com.*, 102 Tex. 338, 113 S. W. 741, 116 S. W. 795; *R. R. Com. v. San Antonio Compress Co.*,

(Tex. Civ. App.) 264 S. W. 214 (Writ refused Id., 114 Tex. 582, 278 S. W. 1115; *Houston Chamber of Commerce v. R. R. Comm.* (Tex. Civ. App.) 19 S. W. (2d) 583, affirmed (Tex. Com. App.) 78 S. W. (2d) 591, and *Missouri-Kansas & T. Ry. Co. v. R. R. Com.* (Tex. Civ. App.) 3 S. W. (2d) 489, 494, affirmed *Producers' Ref. Co. v. Missouri, K. & T. R. Co.* (Tex. Com. App.) 13 S. W. (2d) 679, wherein this court said: 'Rate making is essentially a legislative function, and operates prospectively. *Railroad Com. v. Weld & Neville*, above; *Prentis v. Atlantic Coast Line Co.*, 211 U. S. (210), 226, 29 S. Ct. 67, 53 L. Ed. (150) 158, 159, and authorities there cited. And the same is true of many rules and regulations within the delegated powers of the commission. Rate-making has been delegated to the Railroad Commission alone, and its acts in that regard have the force and effect of statutes, and are subject to review to the extent only that statutes of the same import are so subject, with the additional power which articles 6657 and 6658 confer upon the courts to determine whether a rate, etc., is unreasonable or unjust to the party complaining.

"The case of *Crowell v. Benson*, 285 U.S. 22, 52 S. Ct. 285, 296, 76 L. Ed. 598, in determining the scope of review and whether new evidence will be heard on appeal from a state commission's rate order, held as follows:

"'In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function. The case of confiscation is illustra-

tive, the ultimate conclusion almost invariably depending upon the decisions of questions of fact. This court has held the owner to be entitled to "a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts. * * *

"Assuming that the federal court may determine for itself the existence of these fundamental or jurisdictional facts, we come to the question, Upon what record is the determination to be made? There is no provision of the statute which seeks to confine the court in such a case to the record before the deputy commissioner or to the evidence which he has taken. * * *

"We think that the essential independence of the exercise of the judicial power of the United States, in the enforcement of constitutional rights requires that the federal court should determine such an issue upon its own record and the facts elicited before it."

"See, also, *State Corp. Com. v. Wichita Gas Co.*, 290 U. S. 561, 54 S. Ct. 321, 78 L. Ed. 506; *Lehigh Valley R. Co. v. Com'rs.* 278 U. S. 24, 49 S. Ct. 69, 73 L. Ed. 161, 62 A. L. R. 805; *Prendergast v. N. Y. Tel. Co.*, 262 U. S. 43, 43 S. Ct. 466, 67 L. Ed. 853.

"As regards the statutory appeal authorized by article 6059, to determine whether a rate order is unreasonable and unjust, it is manifest that the Legislature intended for the trial on appeal to be *de novo* and upon new or additional evidence pertinent to the issue, because the complainant is required to show by clear and

satisfactory evidence that such rate is unreasonable and unjust as to it. Similar statutes regarding railroad rates have been so construed by the above-cited Texas cases, and in other States. The scope of judicial appellate review of orders of administrative boards of commissions is usually controlled by legislative enactment. This may be either by a hearing *de novo* or it may mean merely the correction of nonpermissible error. Freund on Administrative Powers over Persons and Property, 278. Statutes which authorize appeals from matters of purely administrative decision or discretion are usually construed to authorize only the correction of nonpermissible error, or to favor the merely corrective scope of review. Illustrative of these matters is the question of issuing a licence, or the granting of a permit, or determining whether a public necessity or convenience exists for bus or truck operation. In such cases the Legislature does not vest in courts the administrative function of determining whether a license, permit, or certificate of convenience or necessity should issue, but merely gives the courts authority to determine whether the action of the administrative board or commission is (a) beyond the power it could constitutionally exercise, or (b) beyond its statutory power, or (c) based upon substantial evidence.

“As to such administrative matters, the legal effect of the findings of fact by the administrative body approximates a question of law, and a finding without evidence, is, of course, beyond the power of the administrative body. Nor will courts in such cases review conclusions of the administrative body based upon conflicting evidence, but will sustain its order if based upon

substantial evidence. Such is the holding in the case of *R. R. Com. v. Shupee* (Tex. Civ. App.) 57 S. W. (2d) 295, affirmed *Id.*, 123 Tex. 521, 73 S. W. (2d) 505, and *R. R. Comm. v. Lamb* (Tex. Civ. App.) 81 S. W. (2d) 161. But the questions of whether a rate is confiscatory or unreasonable and unjust have been held to be legal or justiciable questions of fact, and as to which the wider scope of judicial appellate review seems to have been adopted by the Legislature and courts of this State. The limited scope of judicial review of rates fixed by an administrative commission was first enforced (*Peik v. Chicago, etc. Ry. Co.*, 94 U. S. 164, 178, 24 L. Ed. 97) by the courts, but was soon abandoned, and through a process of trial and argument of several cases, the present rule that the Fourteenth Amendment to the Constitution protects the property of citizens from confiscation by an act of the legislature or by a commission to which legislative regulatory power has been delegated, was developed. *State ex rel. Southwestern Bell Tel. Co. v. Pub. Serv. Com.* (Mo. Sup.) 233 S. W. 425, 430."

2. That the evidence offered by the Gas Company in the district court in an effort to show this rate order illegal because unreasonable and unjust, and confiscatory, was legally insufficient and without probative force because the Gas Company had failed to make a proper segregation of its business and properties as between interstate and intrastate commerce; or as between Texas and Oklahoma properties and operations. It was shown that the Gas Company was operating as an integrated whole its gas properties and business in the two named states. The Court of Civil Appeals then held that the failure of the Gas

Company to make the segregation above indicated was fatal to its case. Stated in another way, the Court of Civil Appeals held that since the company had failed to offer evidence by which the trial court could make the segregation above indicated, it had failed to adduce the "quantum and character" of proof necessary to establish the invalidity of this rate order as being either unreasonable and unjust, or confiscatory.

As already stated, the Gas Company made application to this Court for writ of error from the judgment and opinion of the Court of Civil Appeals in the first instance, and this Court "REFUSED" such application. By such action this Court not only approved the judgment rendered by the Court of Civil Appeals, but we approved "the principles of law declared" by such opinion as well. It follows that we approved the construction placed by the Court of Civil Appeals on Article 6059, *supra*. It also follows that we approved such opinion's holding as to the kind and character of trial contemplated under said Article here involved. We allowed this case to be appealed to and be passed upon by the United States Supreme Court, with Article 6059, *supra*, construed by us as construed by the Court of Civil Appeals in the first opinion.

In its opinion reversing the judgment of the Court of Civil Appeals and remanding this case to that court for further proceedings not inconsistent with its opinion, the United States Supreme Court, so far as germane to this opinion, ruled:

1. It was held that the Railroad Commission having considered all the Gas Company's properties and operations in Texas and Oklahoma as an integrated system in fixing the Texas city gas rate, the Gas Company was entitled to introduce evidence to overcome the Commission's findings on the same basis, in an effort to prove the rate here contested confiscatory; and the Gas Company having succeeded in this and won a judgment holding the rate confiscatory, it was error for the Court of Civil Appeals to reverse the judgment of the district court and uphold the rate order because the company had failed to make a segregation of its interstate and intrastate properties and business.

2. It was either held that Article 6059, *supra*, accords and contemplates a *de novo fact* trial in cases like this, or it was assumed that such is the right of the Gas Company, and the purpose and intent of such statute. At this point we pause to say that the United States Supreme Court could not have indulged in any other presumption in view of the holding of the Court of Civil Appeals in its first opinion, which holding had been duly approved by this Court.

As we construe its rulings, when this case came before it the second time after it had been reversed by the United States Supreme Court, the Court of Civil Appeals, in effect, ruled:

1. That even to construe Article 6059, *supra*, as contemplating a *de novo fact* trial in the district court in gas rate order confiscation cases, under the

undisputed evidence in this record the Gas Company failed, as a matter of law, to offer evidence sufficient to justify holding this gas rate order confiscatory, or unreasonable and unjust.

2. That Article 6059, *supra*, does not contemplate a *de novo* fact trial in the district court in gas rate order cases even where the issue of confiscation is tendered and tried. In this connection, we construe the opinion of the Court of Civil Appeals to hold that in actions tried under Article 6059, *supra*, to set aside a gas rate order as confiscatory, or unreasonable and unjust, the findings of the Railroad Commission are final and conclusive on issues of fact if the evidence is conflicting on such issues.

In order that the rulings of the Court of Civil Appeals, when this case came before it for decision the second time, as to the kind and character of trial provided by Article 6059 may be fully understood, and correctly stated, we quote from the last opinions of that court.

In its main opinion it is said:

“Second. Rate making is essentially a legislative function, and public utility rates fixed by the commission have the same force and effect of statutes, and are subject to court review to the extent only as statutes of the same import are so subject, with the additional statutory authority of the court to determine whether the rate is unjust and unreasonable, and the inherent power of the court to determine the constitu-

tional question of confiscation. *Missouri, K. & T. Ry. Co. v. R. R. Com.*, Tex. Civ. App., 3 S. W. (2d) 489, affirmed, *Producers' Ref. Co. v. Missouri, K. & T. R. Co.*, Tex. Com. App., 13 S. W. (2d) 679, 680. Rates fixed by the Commission are presumed to be valid, reasonable, and just until declared otherwise by a court of competent jurisdiction. *Railroad Com. v. Uvalde Construction Co.*, Tex. Civ. App., 49 S. W. (2d) 1113. In order to overcome this presumption in favor of the validity of the rate on the constitutional ground of confiscation, the burden of proof rests heavily upon the complaining party. *Dayton Power & Light Co. v. Public Utilities Com.*, 292 U. S. 290, 54 S. Ct. 647, 78 L. Ed. 1267. In order to set aside the rate as being unjust and unreasonable, the statute (Art. 6059) requires the complaining party to show 'by clear and satisfactory evidence' that such rate is 'unreasonable and unjust.' The party attacking a rate as being unreasonable and unjust must allege facts which, if proved, would show the rate to be unjust and unreasonable as a matter of law, and to prove by clear and satisfactory evidence 'which leaves no reasonable doubt in the judicial mind that the rate or rule is unjust and unreasonable.' *Railroad Com. v. Galveston Chamber of Commerce*, 105 Tex. 101, 145 S. W. 573, 580; *Railroad Com. v. Weld & Neville*, 96 Tex. 394, 409, 73 S. W. 529. In advance of any actual tests of the practical result of the new rate, the court on appeal will not disturb the rate where it is based upon conflicting evidence as to valuations of property or as to any other item used as a basis for the calculation of the rate, because to do so would merely substitute the findings of the court or jury upon conflicting evidence for that of the Commission, and would therefore permit

the court to exercise the legislative function of rate making. *Newton v. Consolidated Gas Co.*, 258 U. S. 165, 42 S. Ct. 264, 66 L. Ed. 538, 547. Not only are rates presumptively valid because the statute makes them so; but being legislative or official determinations they are so without a statute. *Railroad Com. v. Magnolia Pet. Co.*, 130 Tex. 484, 109 S. W. (2d) 967."

Such opinion further says:

"The instant case is a concrete illustration of the fact that it is neither possible nor desirable for the courts to extend review of legislative or administrative determination beyond requiring that it shall be based upon substantial evidence."

In the per curiam opinion it is said:

"To set this order aside on the ground that appellee is entitled to an independent review of the facts would in effect be to transfer to the trial court the legislative function of rate-making and require that court, through the intervention of a jury of men inexperienced in the technical and intricate subject involved, to substitute its judgment for that of the trained and experienced experts whom the law has provided for that purpose."

We shall first discuss and decide the first ruling of the Court of Civil Appeals,—that is, the ruling that even to construe Article 6059, *supra*, as contemplating a *de novo* fact trial in the district court in gas rate order confiscation cases, under the undisputed evidence in this record the Gas Company failed

to offer evidence sufficient, in law, to justify a finding of confiscation. In passing on this question we take it for granted that no party to this litigation will for a moment contend that it is not the duty of this Court to follow, and give absolute obedience to, the opinion of the United States Supreme Court and the rulings therein contained. We also take it for granted that no one will dispute that the United States Supreme Court held the jury found this rate order confiscatory in answering in the affirmative the only question propounded to it. As to that matter, we quote as follows from the opinion of the United States Supreme Court in this case:

“In view of the definition of ‘fair return’ and ‘unreasonable and unjust’ in the court’s instructions, we are of the opinion that the issue for the jury to determine was in substance whether the rate was **confiscatory**. We so regarded a like submission in the case of *United Gas Public Service Co. v. Texas*, 303 U. S. 123. There the jury’s verdict sustained the rate but that fact does not alter the nature of the issue submitted.” 304 U. S. 231.

The Attorney General earnestly contends that “The Supreme Court of the United States did not consider or pass upon the sufficiency of the company’s evidence, when considered from the viewpoint of this entire properties, but remanded the case to the Court of Civil Appeals in order that the Court of Civil Appeals might first pass upon such evidence under the criterion approved by the Supreme Court.” Counsel for the Gas Company contends to the absolute

contrary. It goes without saying that if the United States Supreme Court did consider and pass upon the sufficiency of the Gas Company's evidence, when viewed as the court held it must be viewed, it is our absolute duty to give effect to such rulings.

After an exhaustive study of Chief Justice Hughes' opinion in this case in the United States Supreme Court, and after viewing such opinion in the light of this record, we have reached the decision that there is no escape from the conclusion that the United States Supreme Court did consider and did pass upon the sufficiency of the Gas Company's evidence, when considered from the viewpoint of the Company's entire properties, and did hold such evidence legally sufficient to sustain the verdict of the jury finding this rate order confiscatory. In fact, we think this is the very essence of the United States Supreme Court's holding. A careful reading of the opinion as a whole will reveal this. Furthermore, if the evidence contained in this record does not even raise a fact issue to be submitted to the jury, the United States Supreme Court reversed this judgment on an absolutely harmless error, and that after that fact had been fully called to its attention by the exhaustive brief and argument filed by the State. We should not ascribe such an action to the United States Supreme Court unless we are compelled to do so.

Further discussing the question as to whether the United States Supreme Court passed upon the sufficiency of the evidence contained in this record to raise

a fact issue on the question of confiscation, we call attention to the following ruling contained therein:

“In view of the definition of ‘fair return’ and ‘unreasonable and unjust’ in the court’s instructions, we are of the opinion that the issue for the jury to determine was in substance whether the rate was confiscatory. We so regarded a like submission in the case of *United Gas Public Service Co. v. Texas*, 303 U. S. 123. There the jury’s verdict sustained the rate but that fact does not alter the nature of the issue submitted.

“Under the state practice the issues of fact were determined in the trial court and on the appeal the Court of Civil Appeals had no authority to make findings of fact. ‘Where the evidence is without conflict, it may render judgment. But where there is any conflict in the evidence on a material issue, it has no authority to substitute its findings of fact for those of the trial court.’ *Post v. State*, 106 Tex. 500, 501; 171 S. W. 707; *United Gas Public Service Co. v. Texas*, *supra*.”

In the above quoted portion of the United States Supreme Court opinion it is held that “the issue for the jury to determine was in substance whether the rate was confiscatory.” In making such a ruling the opinion certainly holds that there was an issue for the jury to determine. If the evidence raised no issue of fact to be found by the jury, there could be no “issue for the jury to determine.” It follows that a ruling that there was an “issue for the jury to determine” can be given no reasonable inter-

pretation, except that it was a ruling that there was an "issue for the jury to determine." When we come to consider the ruling contained in the first paragraph above quoted with the rulings contained in the second paragraph also above quoted, the question under discussion is placed beyond any reasonable doubt. In the second paragraph the opinion carefully and correctly calls attention to the fact that under our State practice issues of fact are determined by the trial court, and on appeal the Court of Civil Appeals has no authority "to substitute its findings of fact for those of the trial court" where the evidence on such issues is conflicting. Certainly, the above ruling when considered with the context and in the light of the entire opinion, holds, and was intended to hold, that in the opinion of the United States Supreme Court this record does present conflicting evidence on the issue of confiscation. It further undoubtedly holds that the Court of Civil Appeals had wrongfully attempted to substitute its findings of fact for the findings of fact made by the trial court on conflicting evidence.

The opinion of the United States Supreme Court does not content itself with the rulings just above quoted, but further holds:

"The Commission's order was presumptively valid, as the state court held, but it was open to attack in this action under the state statute. Appellant was entitled to present evidence to rebut the Commission's findings of value, operating expenses, revenues and return, upon which the

order rested. Appellant presented much testimony and elaborate statistical data for that purpose, treating its property and business as the Commission had treated them. Appellant claimed that this evidence showed a far higher value for its properties than the Commission had allowed and that the rate imposed was confiscatory. The trial court submitted that evidence to the jury, under a proper instruction as to the burden of proof resting upon appellant, and the jury found in appellant's favor."

It will be noted that the above-quoted portion of the United States Supreme Court opinion first holds that "the Commission's order was presumptively valid." It then holds that such order "was open to attack in this action under the state statute." It then holds that the Gas Company "was entitled to present evidence to rebut the Commission's findings of value, operating expenses, revenues and returns upon which the order rested." It then holds that "Appellant presented much testimony and elaborate statistical data for that purpose, treating its property and business as the Commission had treated them." It then holds that the Gas Company contended that "this evidence showed a far higher value for its properties than the Commission had allowed and that the rate imposed was confiscatory." It then holds that "The trial court submitted that evidence to the jury, under a proper instruction as to the burden of proof resting upon appellant, and the jury found in appellant's favor." Can language be plainer? Can it be said that the United States Supreme Court held

that the Gas Company presented "much testimony and elaborate statistical data" on the very question that must be considered in making a rate order, and at the same time such court did not even consider or pass upon the sufficiency of the evidence to raise a fact issue? We think not. Can it be said that the United States Supreme Court held that the case was submitted "to the jury, under a proper instruction," and at the same time be said that such court did not even consider the sufficiency of such evidence to raise a fact issue? We think not.

Still discussing the question as to whether the United States Supreme Court considered and passed upon the sufficiency of the evidence contained in this record to raise a fact question on the issue of confiscation, we quote further from Judge Hughes' opinion:

"Neither the fact that appellant, because of the insistence of the State that the property and business should be segregated, finally introduced evidence for that purpose, nor the inadequacy of its method of segregation, could detract from the force of the proof it had already submitted in direct rebuttal of the Commission's findings. The effort at segregation came after voluminous testimony had been taken which fully presented appellant's case with respect to the value of its property and the result of its operations as an integrated system and the bearing of this evidence upon the contested rate. This proof could not be ignored because of a futile attempt, in response to the State's pressure, to find an alternative ground to support the attack upon the

Commission's order. The first and primary ground remained and the determination of the court of first instance as the trier of the facts that the Commission's rate was confiscatory could not properly be set aside by the application of an untenable standard of proof and in disregard of the evidence which had been appropriately addressed to the Commission's findings and had been properly submitted to the jury."

If there could be any doubt on the question as to whether the United States Supreme Court passed upon the sufficiency of the evidence contained in this record to call for a judicial fact finding by the trial court on the issue of confiscation, it is absolutely removed by the part of its opinion last above quoted. This portion of the opinion holds that neither the failure to segregate, "nor the inadequacy of its method of segregation, could detract from the force of the proof it had already submitted in direct rebuttal of the Commission's findings." The opinion then holds "The effort at segregation came after voluminous testimony had been taken which fully presented appellant's case with respect to the value of its property and the result of its operations as an integrated system and the bearing of this evidence upon the contested rate." The opinion then holds that "This proof could not be ignored because of a futile attempt, in response to the State's pressure, to find an alternative ground to support the attack upon the Commission's order." The opinion then proceeds to hold: "The first and primary ground remained and the determination of the court of first instance as the trier of

the facts that the Commission's rate was confiscatory could not properly be set aside by the application of an untenable standard of proof and *in disregard of the evidence which had been appropriately addressed to the Commission's findings and had been properly submitted to the jury.*" (Emphasis ours.) Could language be plainer? Could it be possible for evidence which is legally insufficient to raise a fact question at the same time be properly addressed to the Commission's findings and be properly submitted to the jury? We think not. Could evidence be wrongfully disregarded, and at the same time be insufficient to raise a fact issue? We think not. Could an issue of fact not even raised by the evidence be properly submitted to a jury? We think not. Could evidence be properly addressed to the Commission's findings, and at the same time be no evidence at all? We think not.

From what has been said it is evident that the United States Supreme Court did consider the question as to whether the evidence offered by the Gas Company in the district court was sufficient, in law, to raise a fact issue on the question of confiscation, and did hold such evidence sufficient. It follows that that question has been decided by the United States Supreme Court in favor of the Gas Company, and such decision is binding on this Court, and was binding on the Court of Civil Appeals.

We now come to consider the kind and character of trial contemplated and provided by Article 6059,

supra, in cases brought thereunder to contest gas rate orders promulgated by the Railroad Commission, on the ground of confiscation, or on the ground of unreasonableness and unjustness. We deem it expedient to here quote the statute:

"If any gas utility or other party at interest be dissatisfied with the decision of any rate, classification, rule, charge, order, act or regulation adopted by the Commission, such dissatisfied utility or party may file a petition setting forth the particular cause of objection thereto in a court of competent jurisdiction in Travis County against the Commission as defendant. Said action shall have precedence over all other causes on the docket of a different nature and shall be tried and determined as other civil causes in said court. Either party to said action may have the right of appeal; and said appeal shall be at once returnable to the appellate court, and said action so appealed shall have precedence in said appellate court of all causes of a different character therein pending. If the court be in session at the time such right of action accrues, the suit may be filed during such term and stand ready for trial after ten days notice. In all trials under this article the burden of proof shall rest upon the plaintiff, who must show by clear and satisfactory evidence that the rates, regulations, orders, classifications, acts or charges complained of are unreasonable and unjust to it or them."

We have already quoted what was held by the Court of Civil Appeals in its first opinion in this case in regard to the kind and character of trial contemplated

by the above statute in confiscation cases. We refused writ of error from such opinion, and thereby approved the holdings therein. We still approve such holdings. In the opinion under consideration the Court of Civil Appeals very ably and very correctly defined the character of trials contemplated by this statute in rate order unreasonable and unjust, and confiscation cases. Also, the Court of Civil Appeals very ably and very correctly defined the kind or character of trial contemplated in cases involving purely administrative orders. In rate cases involving the charge of confiscation, or unreasonableness and unjustness, the opinion holds that the statute contemplates a de novo trial. In matters of administration only the opinion holds that the statute merely contemplates the correction of nonpermissible error. We invite a careful reading of the portion of the first opinion above quoted, in order that the ruling of the Court of Civil Appeals, and of this Court in approving the same, may be fully understood and appreciated.

With Article 6059, *supra*, construed by the Court of Civil Appeals, and by this Court, as affording and contemplating a de novo trial in the district court in confiscation, and unreasonable and unjust cases in gas rate order appeals from the Railroad Commission, as contradistinguished from a mere trial to correct nonpermissible errors, we allowed this case to be appealed to the United States Supreme Court. Also in the manner and way above detailed we allowed the United States Supreme Court to pass on the appeal before it. Stated in another way, we allowed the Uni-

ted States Supreme Court to apply our statute, and to consider and pass upon this case with Article 6059, supra, construed as affording a de novo trial by the Court of Civil Appeals, and by this Court. In the face of such a record we feel that we have made the first ruling of the Court of Civil Appeals the law of this case, and that we ought not now change or alter our opinion.

As stated above, the Court of Civil Appeals held in its first opinion that Article 6059 contemplates a de novo trial in the district court in a case of this kind. Also, as above stated, we approved that holding, and therefore made it the law of this case. That holding was not questioned by the opinion of the United States Supreme Court. To say the least, that court either held to the same effect, or, as it had a right to do, assumed that the Court of Civil Appeals correctly construed our statute.

The opinion itself clearly defines what is meant by a de novo trial. It even goes to the pains and extent to distinguish such a trial from a trial to merely review a nonpermissible error. Even if the opinion of the Court of Civil Appeals did not clearly disclose what is meant by a de novo trial, the authorities generally have so clearly defined the scope of such a trial in a judicial tribunal as to leave no room for debate as to what is covered thereby. A de novo judicial trial means a trial "anew; afresh." Webster's New International Dictionary. A de novo trial means "anew; afresh; in the same manner; with the same effect; a second time." 18 C. J., 486. Power to try

a case de novo vests a court with full power to determine the issues and rights of all parties involved, and to try the case as if the suit had been filed originally in that court. *Zurich General, etc., v. Rodgers*, 128 Tex. 313, 97 S. W. (2d) 675. From the above authorities we conclude that a de novo judicial trial means a full civil trial on the facts as well as the law. It follows that in refusing the writ of error from the first opinion of the Court of Civil Appeals we held that a de novo trial under Article 6059 means a full civil trial on the facts as well as the law, and not merely a trial to correct nonpermissible errors. As to what is meant by a de novo trial we also cite the cases of *Shultz & Bro. v. Lempert*, 55 Tex. 273, and *Ex parte Morales*, 53 S. W. 107.

In 1891 the Legislature of this State enacted a comprehensive Act providing for the regulation of railroads and railroad rates in this State. Section 16 of this Act was codified as Article 4565, R. C. S. of Texas, 1895. The same statute, so far as applicable here, was codified in 1911 as Article 6657, and in 1925 as Article 6453. All of the above statutes provide:

“If any railroad company * * * be dissatisfied with the decision of any rate * * * such dissatisfied company * * * shall file a petition setting forth the particular cause or objection to such * * * rate * * * in a court of competent jurisdiction in Travis County, Texas, against the Commission as defendant. Said action * * * shall be tried and determined as other civil cases in said court. * * * ”

The above statute, so far as pertinent here, is in the same language as Article 6059, *supra*, under which this case was tried. The only difference between Article 6059 and Article 4565, R. C. S. 1895, and subsequent codifications, so far as this case is concerned, is that one statute refers to railroad rates and the other to gas rates. It is therefore evident that the two statutes confer upon the district court exactly the same jurisdiction to try and determine fact questions in contested rate cases. If the Supreme Court had determined and decided the kind of trial provided by the railroad statute, *supra*, at the time Art. 6059, *supra*, was enacted, it must be presumed that in enacting such subsequent statute in the same language as the railroad statute, the two should be given the same construction. Further, it is presumed that the Legislature intended Article 6059, the subsequent statute, to be construed as the Supreme Court had already construed the railroad statute. Also, it is a rule that the intention of the Legislature, once ascertained, is the law. These rules are axiomatic and require no citation of authorities.

At the time Article 6059, *supra* was enacted the Supreme Court had already construed Article 4565, *supra*, and its subsequent codifications as providing for a *de novo* trial in cases where rate orders of the Railroad Commission were under attack. *Railroad Commission v. H. & T. C. Ry. Co.*, 90 Tex. 340, 38 S. W. 750; *Railroad Commission v. Weld & Neville*, 96 Tex. 394, 73 S. W. 529; *G. C. & S. F. R. Co. v. Railroad Commission*, 102 Tex. 338, 113 S. W. 741.

In *Railroad Commission v. H. & T. C. Ry. Co.*, supra, it is shown that the Commission promulgated a certain order whereby it prescribed a schedule of rates in cents per hundred pounds on shipments of cotton between points in Texas. The order also contained certain rules with reference to the compression of cotton, etc. The Railroad Company attacked such order as unreasonable and unjust, and confiscatory. The Attorney General took the position that the court had no jurisdiction to review the order of the Commission unless the complainant should show that the order complained of amounted to a taking of property without proper compensation or without due process of law,—that is, unless the order complained of amounted to confiscation. In this connection, it was contended by the Attorney General that the words “unreasonable” and “unjust,” as used in the railroad statute, meant that the act or the order of the Railroad Commission must be so unreasonable or so unjust as to be violative of the Constitution. The opinion emphatically rejects such contention, and holds that the statute clothes the court with jurisdiction not only to determine the constitutional issues of confiscation, but goes further and clothes the court with jurisdiction to try and determine issues regarding whether or not Commission orders are “unjust” or “unreasonable.” The opinion then holds that the Court, when proceeding under the statute, has jurisdiction or power to try the case both as regards confiscation and “unreasonable and unjust” by the ordinary rules of procedure unless otherwise provided. Prior to making the last ruling the opinion refers to

the fact that the United States Supreme Court had announced the law to be "that the action of the Legislature of a State or of a Commission created by the State in fixing rates of transportation, would be reversed and set aside and annulled when it violates the constitutional right of the carrier to that degree which amounts to the taking of property without compensation or without due process of law." Could language be plainer? Can it be doubted that the opinion under discussion holds that the railroad statute confers jurisdiction to try confiscation cases, and unreasonable and unjust cases, just as any other civil suit? Indeed, the opinion goes further and holds that cases involving whether Commission rate orders are "unreasonable" or "unjust" can be tried in the same way as confiscation cases. We will later refer to the matter as to how suits involving mere administrative orders should be tried. In fact, this matter has been fully discussed and correctly decided by the Court of Civil Appeals in its first opinion in this case. Finally, we wish to say that the opinion under discussion places the question of the kind and character of trial provided by the railroad statute at the time Article 6059, *supra*, was enacted beyond any reasonable doubt by its answer to the second certified question therein propounded by the Court of Civil Appeals. We quote the following from the opinion:

"To the second question we answer: In actions of this character the courts will determine the question of reasonableness and justice of any matter by the same rules as if it were an issue

in other classes of suits, except as to the conclusive character of the evidence."

It had already been determined that the statutory conclusiveness was clear and satisfactory evidence.

In *Railroad Commission v. Weld & Neville*, supra, this Court had before it a case in which it was charged that a certain cotton rate order and rules incident thereto were unreasonable and unjust because discriminatory. The Railroad Commission contended that the suit could not be maintained under Article 4565, the railroad statute, and the succeeding Article 4566 of the same codification because such statutes do not authorize the courts to inquire into the reasonableness and justness of railroad rates, rules, and regulations made by the Commission, except to ascertain whether they amount to the taking of property without due process of law,—that is, unless they amount to confiscation. The court referred to the fact that it had decided that question in the H. & T. C. Ry. Co. case, just above discussed, and again announced the law to be that under the railroad statute the court was clothed with the power to try confiscation rate cases together with cases involving unreasonableness and unjustness "*by the same rules that would apply in determining a like question between other parties.*" The court then calls attention to the fact that the making of rates is a legislative and not a judicial function, but by subjecting the rates to be made by the Commission to judicial ex-

amination their reasonableness became a judicial question.

A careful reading of the above opinion will disclose that the court very carefully deals with the question of rate making as the exercise of legislative, as contradistinguished from purely administrative, power. We think the court correctly holds that in exercising jurisdiction to review railroad rates promulgated by the Commission on either the question of confiscation, or unreasonableness and unjustness, the court is not reviewing an administrative order but a legislative act. Rate making is not administrative at all, but essentially legislative. The opinion holds that the railroad judicial review statute, as applied to Commission rate orders, contemplates a judicial trial or review "by the same rules as would be applied in determining like questions between other parties" of a legislative act.

The case of *G. C. & S. F. Ry. Co. v. Commission*, *supra*, settles beyond debate that the Supreme Court had construed the railway review statute as contemplating a *de novo* fact trial in the district court. In that case the court had before it a Commission order fixing rates for the transportation of lumber. The rate order was attacked as unreasonable and unjust, and also as confiscatory. In answering a certified question this Court said:

"This action was brought under articles 4565 and 4566 of the Revised Statutes, which are copied in our former opinion. In the case of

Railroad Commission v. Houston & Texas Central Railroad Co., 90 Texas, 340, this court held that in a proceeding under those articles of the statute it was not necessary for the railroad company to show that the rate attacked was confiscatory, but that the issue was whether or not, under all the facts and circumstances, the rate was unreasonable and unjust, and, in answer to the second question propounded in that case, the court said: 'In actions of this character the courts will determine the question of reasonableness and justice of any matter by the same rules as if it were an issue in other classes of suits, except as to the conclusive character of the evidence.' (90 Texas, 355; *Weld v. Neville*, 96 Texas, 404.) If articles 4565 and 4566 had not been enacted by the Legislature the courts would have no authority to revise rates made by the Railroad Commission, but in the exercise of their equity powers the courts could enjoin such rates if found to be confiscatory; that is, violative of the Constitution of this State or the United States. Those articles conferred authority upon the courts to examine into the reasonableness and justice of such rates and in the exercise of that jurisdiction the courts will try the questions as if they arose in any other proceeding. Article 4566 places the citizen in such an action as this upon the same footing as it does the railroad corporations and requires of such citizen who may be a shipper upon the railroad to make just as clear and conclusive proof of the unreasonableness or injustice of the rates as is required of a railroad company.

"It is true that by article 4566 the railroad company, or shipper, who attacks the rate or order of the Commission, has the burden to show

by 'clear and satisfactory evidence' that the rate or order, etc., attacked in the proceeding is unjust and unreasonable in its effect upon such carrier or person. The question presented to us is, if the facts alleged in the applicants petition shall be established by 'clear and satisfactory evidence,' would a jury be authorized to find a verdict that such rates, charges, etc., were unreasonable and unjust to the appellant? In passing upon the question we must consider the allegations in the petition as facts proved by 'clear, satisfactory and uncontroverted evidence.' It is a matter of common knowledge that lumber is one of the principal articles of transportation on the railroads and a chief source of income. It being true that the revenue derived from hauling lumber over the appellant's road does not yield sufficient revenue to pay for the costs of transporting it, not including interest on investment, taxes or other expenses, there could be no reasonable doubt that such rate applied to lumber would be unreasonable and unjust to that railroad."

It will be noted that the opinion says: "The question presented to us is, if the facts alleged in the applicant's petition shall be established by 'clear and satisfactory evidence,' would a jury be authorized to find a verdict that such rates, charges, etc., were unreasonable and unjust to the appellant?" By its discussion following this quotation, and the discussion preceding the same, the court answers that there could be a jury question. This is clear, because the first question certified to the Supreme Court by the Court of Civil Appeals was whether the trial court erred in sustaining the Railroad Commission's gen-

eral demurrer to the railroad company's petition. The Supreme Court held that the question certified by the Court of Civil Appeals really presented the question as to whether or not evidence could raise an issue to submit to the jury. The court then answered, in effect, that a jury question could be presented under the statute. If the statute only contemplates a law trial, and further contemplates that the fact findings of the Commission shall be final on conflicting evidence, it would be impossible to have a jury trial thereunder. This is evident because only a law trial could be had whether the evidence be conflicting or all one way.

We think we have fully demonstrated that the railroad statutes of like import as Article 6059, *supra*, had been uniformly construed by this Court as contemplating a *de novo* fact trial in the district court in rate order cases at the time the Legislature enacted Article 6059, *supra*. We therefore think it must be presumed beyond a doubt that the Legislature intended Article 6059, in the same language, to award the same character of judicial trial or review as the railroad statutes.

We think our decisions since the enactment of Article 6059 have uniformly upheld a *de novo* trial in the district court in matters not merely administrative under the railroad statutes. *St. Louis & S. W. Ry. Co. v. State* (Com. App.), 255 S. W. 390; *Houston Chamber of Commerce v. Railroad Commission* (Civ. App., affirmed by Sup. Ct.), 78 S. W. (2d) 591, 19 S. W. (2d) 583; *Railroad Commission v. San*

Antonio Compress Co. (Civ. App., writ refused), 264 S. W. 214; *P. & N. T. Ry. Co. v. Railroad Commission* (Civ. App., writ refused), 193 S. W. 770.

In *St. Louis & S. W. Ry. Co. v. State*, supra, which was a suit under the railroad statute (opinion by the Commission of Appeals), it was held that the case had to be tried as ordinary civil cases. It was further held that the Court of Civil Appeals did not have jurisdiction to substitute its findings of fact for those of the jury on disputed issues of fact.

Houston Chamber of Commerce v. Railroad Commission, supra, is a rate case. The opinion is by the Court of Civil Appeals for the Third District, at Austin. It exhaustively construes Articles 6653 and 6654, R. C. S. 1925, the railroad statutes. Such opinion then carefully defines the kind and character of trial provided by such statutes in appeals from Railroad Commission rate orders. The opinion holds: "But, when the rates are made, and whether or not the parties interested other than the carriers are notified or appear, they are given the express statutory right to bring in question the unreasonableness, unjustness, and discriminatory effect *to them* of such rates. * * * The trial in such a proceeding is by express statute governed by the same rules as civil causes generally, and there is no limitation other than that which affects civil causes generally upon the rights of the parties to be heard or to introduce evidence."

The case of *Railroad Commission v. San Antonio*

Compress Company, supra (opinion also by the Court of Civil Appeals for the Third District, at Austin), is, in effect, a rate case. The opinion says: "It is not our function to pass upon the wisdom of legislative action. There may be cogent reasons for the contention urged by appellants, but their remedy is with the Legislature, not with the courts. The language of the Supreme Court, quoted in our opinion herein, interprets the provision of article 6657 that an action to set aside an order of the Commission 'shall be tried and determined as other civil causes in said court,' as meaning, in our opinion, that except as to the burden of proof, *there shall be no difference between such suit and any other civil suit, from the time the cause is filed or presented to the court until final judgment is rendered therein.*" (Emphasis ours.)

The opinion further holds that "under the Supreme Court's interpretation of the statute as it now reads, the orders of the Railroad Commission, when called in controversy by suit, must be subject to the action of the courts in the same manner and subject to the same orders and method of procedure as any other civil suit, except where specifically stated otherwise."

In the case of *P. & N. T. Ry. Co. v. Railroad Commission*, supra, (application for writ of error refused by the Supreme Court), the opinion holds that the appellate court cannot look to the evidence, unless it is uncontradicted, to see what the jury ought to have found.

The great length to which we have extended this

opinion moves us to abstain from discussing further authorities.

From our discussion of the United States Supreme Court opinion in this case it is evident that we hold that that court did consider and pass upon the sufficiency, in law, of the evidence contained in this record to raise an issue of fact on the question of confiscation involved in this appeal. It is also evident that we hold that such opinion decides that the evidence contained in this record is sufficient, in law, to invoke the fact finding jurisdiction of the district court. It follows that such matter has been foreclosed by the United States Supreme Court, and is not open for decision by this Court, and was not open for decision by the Court of Civil Appeals.

It is also evident that we hold that Article 6059 of our Revised Civil Statutes clothes our district court with fact finding jurisdiction in cases attacking gas rate orders of the Commission as being either unreasonable and unjust, or as being confiscatory.

A rate order may be unreasonable and unjust without being confiscatory. On the other hand, a rate order cannot be confiscatory without being unreasonable and unjust. If a rate order merely fails to yield a fair profit or return, it is unreasonable and unjust, but not confiscatory. If it will not only not yield a fair profit or return, but calls on the utility to operate at a loss, it is confiscatory.

The Attorney General cites the case of *Shuppee v.*

Railroad Commission of Texas, 123 Tex. 521, 73 S. W. (2d) 505, as supporting the rule that the fact findings of the Commission on conflicting evidence are final in this case, a rate case. To our minds the Shupee case, properly interpreted, supports our opinion in this case. The Shupee case was tried under the Motor Bus Act, Art. 911a, Vernon's Statutes. Section 17 of such Act provides for judicial review in a District Court of Travis County, Texas. Such statute clothes the district court with exactly the same jurisdiction as our railroad review statutes and Article 6059. Shupee applied to the Railroad Commission for a certificate of convenience and necessity to operate a motor bus line over the public highways of this State for profit. The certificate was denied, and Shupee applied to the district court to set aside such order. This Court very properly held: "The Legislature never intended that the court should put itself in the place of the commission, try the matter anew as an administrative body, substituting its findings for those of the commission." When the Commission makes a rate order, it acts not as a mere administrative agency of this State exercising sound discretion, but to the contrary it acts legislatively to fix rates that must yield fair returns, and that must not confiscate property.

It will be noted that Article 6059, *supra*, the statute under which this case was tried, requires that cases instituted thereunder "shall be tried and determined as other civil causes in said court." This same statutory provision appears in both the railroad and the

motor bus acts already referred to. So far as we have been able to ascertain, it appeared first in the railroad act. It means just what it says. Under our practice, as shown by the Shupee case, *supra*, a court is not an administrative agency, and therefore in administrative matters it does not substitute its judgment and discretion for the judgment and discretion of a duly constituted administrative agency of the State. *Gulf Land Co. v. Atlantic Ref. Co.*, Tex., 131 S. W. (2d) 83. It follows that in an administrative matter the judgment and discretion of the State's administrative agency must prevail in cases where the evidence is conflicting. When the Commission acts to prescribe rates to be charged by common carriers and public utilities, it fixes the price or rate that such concerns must subject their properties to the use of the public for. It therefore operates legislatively, not administratively, and the courts, in such matters, under the statutes mentioned, will determine for themselves, in the manner and way prescribed by law, whether the properties of such concerns have been confiscated for the benefit of the public, or whether the properties of such concerns have been appropriated to, or required to serve, the public for an unreasonable and unjust return.

As to the power of the courts to review fact findings of the Commission in cases involving administrative matters, we refer to the opinion of this Court in *Gulf Land Co. v. Atlantic Refining Co.*, *supra*. That case involved a controversy under oil and gas Rule 37, an administrative matter. We there held

that the "court does not act as an administrative body to determine whether or not it would have reached the same fact conclusion that the Commission reached, but will consider only whether the action of the Commission in its determination of the facts is reasonably supported by substantial evidence." The very basis of the rule announced in the Gulf Land Company case that the findings of the Commission are final on disputed issues of fact, is that the court is not an administrative body. We still adhere to the views we expressed in the Gulf Land Company case as applied to the fact findings of the Commission in instances where it acts as an administrative board or commission. We think, however, that our decisions have settled it as the law of this State that the fact findings of the Commission are not final, where the evidence is conflicting, in cases where an order of the Commission, not administrative, but legislative by nature, is under attack as being either unreasonable and unjust, or confiscatory.

Counsel for the Gas Company contend that it does not lie within the power of the Legislature to enact a law making fact findings of the Railroad Commission final in rate order cases where the issue of confiscation is being tried, and the evidence is conflicting. We express no opinion on that question because we are not here confronted with such a law.

From all that we have said it is evident that that part of the judgment of the Court of Civil Appeals which renders judgment for the State and the Rail-

road Commission upholding this gas rate order cannot stand. We shall now examine this record to determine whether we will affirm the judgment of the district court or reverse the same, and remand the cause for a new trial.

As we interpret its opinion, the Court of Civil Appeals holds that the trial court erred in refusing to permit the State to introduce in the trial in the district court the transcript or record of the evidence heard by the Commission. As we interpret such opinion, this holding is based on the further holding that the trial in the district court is not a *de novo* trial in the sense that we have defined the same. In regard to this matter, the Attorney General argues, in his brief, "The only way in which the holding of the district court can be supported is on the theory that the hearing before the district court is strictly a trial *de novo*, * * ." Since we hold that the trial in the district court is *de novo*, it follows that such court did not err in the respect under consideration. It is the settled law that under an exception to the general rule against hearsay evidence, "testimony of a witness given at a former trial of the same case on substantially the same issues, and where there was opportunity for cross examination, may be reproduced where it is shown that the witness is dead, or that he had become insane, or is physically unable to testify, or is beyond the jurisdiction of the court, or that his whereabouts is unknown and that diligent search has been made to ascertain where he is, or that he has been kept away from the trial by the adverse party." We think that on another trial of this case

the rule just announced should be applied. 17 Tex. Jur., pp. 658, 659, and authorities there cited. We also cite as in point on this question the following authorities: *Railroad Commission v. Rau*, 45 S. W. (2d) 413; *State v. St. Louis Southwestern Ry. Co.*, 165 S. W. 491.

The Rau case, *supra*, involved an action of Gus Rau "against the railroad commission, under section 17 of Chapter 270 of the General Laws of 1927 (article 911a, sec. 17, Vernon's Ann. Tex. Civ. Stat.), regulating motorbus transportation of passengers on public highways, for the purpose of reviewing an order of the commission refusing to make permanent a certificate in favor of Rau, authorizing him to operate a motor bus between San Antonio and San Angelo, * * *." In such case the Court of Civil Appeals for the Third District, speaking through Chief Justice McClendon, held:

"Appellants contend that the transcript of the record in the railroad commission hearing was improperly excluded on the ground that the proceeding provided for in section 17 of the act is merely a review of the correctness of the order of the commission based upon the record before it. This contention is supported by a number of citations from other states, the statutes of which are different from our own, which provides that the proceeding 'shall be tried and determined as other civil causes in said court.' Similar provisions appear in R. S. arts. 6059 and 6453, giving the right of appeal to the courts from orders of the railroad commission in other matters; and the holding has been, wherever the question has

arisen, that the proceeding in the district court is a trial de novo, and not merely a review of the railroad commission's action upon the record made before the commission. Each party is permitted to introduce such evidence as is pertinent to the controversy, regardless of whether it had been introduced before the commission, as in all other de novo trials.

"The opinion of the commission is important only as showing the grounds upon which it based its action.

"The transcript of the evidence before the commission is not admissible as such. It might become admissible as secondary evidence where a proper predicate is laid; and it may be employed for impeachment purposes, which appears to have been freely done in this case."

A reading of the above opinion will show that it was there clearly held that where the trial is de novo on an appeal from the Railroad Commission to the district court, "The transcript of the evidence before the Commission is not admissible as such." It is also there clearly held that the transcript of the evidence heard by the Commission "might become admissible as secondary evidence where a proper predicate is laid; and it may be employed for impeachment purposes, * * *."

In State v. St. Louis, etc., supra, the action was by the State against three railroads to recover penalties for violation of orders of the Commission with reference to the construction of a union depot, and for a

writ of mandamus and mandatory injunction to require the erection and maintenance of a union depot at Hillsboro, Texas, in accordance with a Railroad Commission order. In passing on the question as to whether the transcript of the evidence heard by the Commission was admissible in evidence in the district court trial, the opinion says:

“We did not mean to say that we were called upon to review the evidence adduced before the commission. We have no knowledge as to what such evidence was. The only testimony in the record is that given in the district court upon the trial of this case, and upon such trial it would not have been permissible to prove what was testified to before the Railroad Commission, except by way of impeaching a witness.”

The opinion of the Court of Civil Appeals in this case holds that the trial court erred in its charge to the jury wherein such charge defines the term “Used and useful.” The following is a portion of the charge held to be erroneous:

“By the term ‘used and useful’ is meant the property of the defendant actually being used by the defendant in the production, transportation, sale, and delivery of natural gas to its customers; and also such property as has been acquired by the defendant in good faith and held for use in the reasonably near future in order to enable it to supply and furnish adequate and uninterrupted gas service.”

We are unable to agree with the holding of the

Court of Civil Appeals that the above charge was erroneous for two reasons, (a) because we think the opinion of the United States Supreme Court decides otherwise, and (b) because the decision is based on an erroneous assumption.

As to the holding (a), *supra*, we call attention to the fact that the opinion of the United States Supreme Court holds that only the issue of confiscation was submitted to the jury. As to that issue such opinion holds that it was properly submitted by the trial court. We interpret the holding that the issue was properly submitted to amount to a holding that it was correctly submitted.

As to our holding (b), *supra*, we interpret the opinion of the Court of Civil Appeals to hold that the portion of the trial court's charge above quoted is erroneous because the findings of the Commission on the question of what property was "used and useful" is final where determined by that agency on substantial evidence. Of course, our decision that the trial is *de novo* under Article 6059 in cases like this contesting rate orders of the Commission overrules this holding of the Court of Civil Appeals.

Our holding with reference to the charge of "used and useful" also disposes of the rulings of the Court of Civil Appeals with reference to the book costs of the Gas Company's undeveloped gas leaseholds. Our holdings, *supra*, also dispose of the rulings of the Court of Civil Appeals with reference to the Gas Company's developed and productive leaseholds.

We agree with the following rulings of the Court of Civil Appeals:

"The trial court also erred in permitting the Gas Company's witness, Ed. C. Connor, to testify in effect that he knew what percentage rate of return the Railroad Commission had always fixed for gas utilities; and that it had never fixed a rate of less than 7%. This evidence was primarily intended to bear upon the question of the reasonableness or justness of the rate as to whether 6% would afford a reasonable return. The witness made no comparable basis between the rate fixed in this case and those which had been fixed for other similar gas utilities. So far as the record shows, this was the first pipe line gate rate case the Commission of Texas ever had up to that time. And while the record shows that the Commission has in some instances allowed a slightly higher rate of return to distributing companies, such difference in allowance has reasonable factual basis. In this situation, the testimony of the expert that the Commission had never allowed less than 7%—no factual basis showing any other gas utility of a similar nature had ever been allowed 7% on a comparable basis with this Gas Company—was clearly objectionable.

"The trial court erred in refusing to exclude upon objection of the Commission Volumes 7 and 8 of Exhibit 28, presented by the Gas Company's expert Connor, because, in addition to estimates, calculations, and comparisons which may have been proper, they contained the written arguments and self-serving and hearsay declarations of the expert in support thereof.

Such written arguments, hypotheses, and authorities cited by the expert witness in attempting to sustain his elaborate calculations were improper, and were no more admissible than if a lawyer in the case had written his argument and submitted it to the jury. *Dallas Ry. & Terminal Co. v. Curtis*, Tex. Civ. App., 53 S. W. (2d) 85; 22 C. J. 199. This same holding is made with respect to Exhibit No. 42 by the same witness Connor; and to Exhibits Nos. 4 to 14 both inclusive, by witness Hulcy."

It is evident from our holdings above that this case must be remanded to the district court for a new trial. It therefore becomes necessary for us to determine whether, in this action, the Gas Company can attack this rate order on the ground that it has become invalid since it was promulgated, or whether the case must be tried on the question as to whether or not it was invalid at that time.

We think that, as this record stands, the district court must determine the validity, or invalidity, of this rate order on conditions as they existed at the very time it was promulgated. If the Gas Company wishes to contest such order on the ground that it has become invalid since it was promulgated, on account of changed conditions, it must first invoke the jurisdiction of the Commission to pass on that question. *Gulf Land Co. et al v. Atlantic Refining Co. et al.*, ---Tex.---, 131 S. W. (2d) 73. In the case just cited we held that the district court could not determine a material controverted fact question which was not passed on by the Commission, in order to sus-

tain a Commission order. This being true, it ought not be permissible for a district court to annul a Commission order on a ground not even presented to the Commission for its decision.

We are aware of the fact that without special legislative authority the judicial branch of the government is without power or jurisdiction to review a rate order of a duly constituted and authorized rate-making authority, on the ground of mere unreasonableness and unjustness, as contradistinguished from confiscation. We are also aware of the fact that the decisions of this Court hold that even without special legislative authority the judicial branch of the government, in the exercise of its equity powers, has jurisdiction to review a rate order of a duly constituted and authorized rate-making authority, on the ground of confiscation. *Railroad Com. v. H. & T. C. Ry. Co.*, *supra*; *G. C. & S. F. Ry. Co. v. Railroad Com.*, *supra*. In spite of the rule, as applied to confiscation, *supra*, we think it is within the power of the Legislature to substitute an adequate legal remedy for the equitable remedy above indicated, regarding confiscation. We think further that the legal remedy prescribed by our statutes requires any person or party aggrieved with a rate order of the Commission, on account of changed conditions, to first apply to that authority for relief, stating the ground therefor, before resorting to court. It follows that if it is contended that a rate order, valid at the time of promulgation, has become invalid on account of changed conditions, that matter should first be presented to the Commission,

before a resort to the district court. This is because Article 6059 and allied statutes clearly contemplate that the Commission should be given an opportunity to pass on questions of unreasonableness and unjustness, and confiscation, before such questions are presented for judicial determination. We think this rule meets the requirement of due process of law, and furnishes an adequate remedy.

The rate order here attacked is certainly not invalid on its face. If any invalidity or defect exists therein, an examination of the order alone would not disclose that fact. In order to disclose any defect or invalidity which may exist in this order, it will be necessary to go behind the same and introduce evidence to prove that fact. So long as the order stands, and is in force, it is the duty of the Gas Company to obey it. It follows that Article 6059 and allied statutes prescribe the exclusive statutory judicial remedy for all persons and parties who wish to attack this order. *Alpha Pet. Co. v. Terrell et al.*, 122 Tex. 257, 59 S. W. (2d) 364.

Since this case must be remanded to the district court for another trial, we deem it proper to make the following observations with reference to the character of evidence which may become admissible during the trial: As a general rule, any evidence is relevant and material if it tends to prove, or disprove, any material fact involved in the issue or the question being tried. This rule also embraces evidences which throws light on the transaction itself. 17 Tex. Jur.,

p. 338, sec. 106, and authorities there cited. Under these rules, we think that even though the Commission's order must stand or fall, as this record now stands, on conditions as they existed at the time the Commission acted, it is proper to admit evidence as to conditions and transactions existing and transpiring after the promulgation of the order, and even before, if such evidence tends to prove, or disprove, the validity, or invalidity, of this order at the time it was made, or if it throws light on that question.

The judgment of the district court is reversed. The judgment of the Court of Civil Appeals, in so far as it renders judgment for the State in this case, is reversed. The judgment of such court, in so far as it reverses the judgment of the district court, is affirmed. The cause is remanded to the district court for a new trial.

RICHARD CRITZ,
Associate Justice.

Opinion delivered
April 30, 1941

CLERK'S OFFICE, SUPREME COURT
OF TEXAS

I, S. A. Philquist, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing 33 pages contain a true and correct copy of the opinion of the Supreme Court delivered on April

30th, 1941, in cause No. 7664, styled Lone Star Gas Company, Plaintiff in Error, v. The State of Texas, et al, Defendants in Error, from Travis County, Third District, as the original of said opinion appears on file in my office.

In testimony whereof, witness my hand and the seal of the Supreme Court of Texas, this the 28th day of August, 1941.

(SEAL)

S. A. PHILQUIST, Clerk,

(Signed)

By J. P. Byrne,
Deputy.

EXHIBIT "T"

**CLERK'S OFFICE, SUPREME COURT
OF TEXAS.**

JUDGMENT OF SUPREME COURT

April 30, 1941

No. 7,664.

Lone Star Gas Company,
vs. From Travis County, 3rd District.
State of Texas, et al

OPINION BY MR. JUSTICE CRITZ

This cause came on to be heard on writ of error to the Court of Civil Appeals for the Third Supreme Judicial District, and the original transcript in said cause being before the Court, as well as the transcript showing the proceedings had in said Court of Civil Appeals, and these having been duly considered, because it is the opinion of the Court that there was error in the judgment of the District Court, and, in part, error in the judgment of the Court of Civil Appeals, it is **THEREFORE ORDERED, ADJUDGED AND DECREED** that the judgment of the District Court be reversed; that the judgment of the

Court of Civil Appeals, in so far as it renders judgment for the State in this case, be, and the same is hereby, reversed, and that the judgment of the Court of Civil Appeals, in so far as it reverses the judgment of the District Court, be, and the same is hereby, affirmed. It is therefore the further order of this Court that this cause be remanded to the District Court for a new trial in accordance with the opinion herein delivered.

It is further ordered that the Defendants in Error, the State of Texas, the Railroad Commission of Texas, and the Attorney General of the State of Texas, pay all costs in this behalf expended in this Court, and the Plaintiff in Error, Lone Star Gas Company, and its surety, National Surety Corporation, pay all costs incurred in the Court of Civil Appeals, and this decision, with a copy of the opinion herein delivered, be certified to the District Court for observance.

EXHIBIT "J"

No. 7664

**IN THE SUPREME COURT
OF TEXAS**

LONE STAR GAS COMPANY,
Plaintiff in Error

v.

STATE OF TEXAS, ET AL,
Defendants in Error

**MOTION FOR REHEARING OF
DEFENDANTS IN ERROR**

To The Supreme Court of Texas:

Now come the State of Texas, the Railroad Commission of Texas, and its Members, Ernest O. Thompson, G. A. Sadler, and Olin Culberson, and Gerald C. Mann, Attorney General of Texas, defendants in error, and respectfully move the Court to grant a rehearing and upon such rehearing to set aside its judgment and opinion heretofore entered on April 30, 1941, and that judgment be entered affirm-

ing the judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas, and for grounds for such motion, say:

FIRST ASSIGNMENT OF ERROR

This Court erred in holding that under the decision of the Supreme Court of the United States in this case, the Court of Civil Appeals had no right to examine the evidence by applying a proper standard of proof and to set aside the judgment of the District Court upon the application of such proper standard.

It is earnestly submitted that this Court has failed to make a correct analysis of the opinion of the Supreme Court of the United States in this case. We agree that "in the opinion of the United States Supreme Court this record does present conflicting evidence on the issue of confiscation." It was only in this sense (that the evidence was conflicting) that the Supreme Court of the United States passed upon "the sufficiency of the evidence to raise a fact issue." It does not follow from this holding of the Supreme Court of the United States, however, that the issue of confiscation was one which had to be submitted to and which would be finally determined by the jury in the District Court, nor does it follow that the Court of Civil Appeals, under the opinion of the Supreme Court of the United States, had no right to review and set aside the jury's findings upon the application of a proper standard. The holdings of the

Supreme Court of the United States may be outlined as follows:

(1) There was conflicting evidence before the District Court upon the issue of confiscation.

(2) The company had the right to attack the Railroad Commission's order on the basis of the over-all evidence and was not required to segregate its Texas business and property.

(3) The form of the special issue submitted to the jury by the District Court was a proper form in which to submit the issue of confiscation, assuming that the jury rather than the court should determine this issue.

(4) The Court of Civil Appeals, in reviewing the judgment of the District Court, "reversed the judgment upon a distinct ground" (304 U. S. at page 240), which was "that appellant had not sustained its burden of proof because it had failed to make a 'proper segregation of interstate and intrastate properties and business.' Thus, the necessity for that segregation was made the criterion." (304 U. S. at pages 240-241)

(5) The essential holding of the Supreme Court of the United States is stated in its opinion as follows:

"We think that this ruling as to the necessity of segregation, and that the sufficiency of appel-

lant's evidence should be determined by that criterion, was erroneous." (304 U. S. at page 241)

(6) Since the Court of Civil Appeals applied "an untenable standard of proof," the Supreme Court of the United States entered the following order:

"The judgment of the Court of Civil Appeals is reversed and the cause is *remanded for further proceedings* not inconsistent with this opinion." (304 U. S. at page 242). (Emphasis ours)

The effect of the holding of the Supreme Court of the United States is that, since the evidence was conflicting and since the Court of Civil Appeals had applied an untenable standard of proof, the cause should be remanded to the Court of Civil Appeals for consideration of such evidence by application of the proper standard.

The Supreme Court clearly did *not* undertake to determine what procedure must be followed by the Texas Courts in reviewing orders of administrative bodies. The question of whether the court or the jury must pass upon the issue of confiscation is a local question, as to which the Federal Courts merely follow the State law. In the case of *United Gas Public Service Company v. Texas*, 303 U. S. 123, the Supreme Court of the United States speaking through Chief Justice Hughes, said: (303 U. S. at page 140)

"* * * *The State is entitled to determine the procedure of its courts, so long as it provides*

the requisite due process. And on that question we have never held that it is beyond the power of the State to provide for the trial by a jury of questions of fact because they are complicated. Cases at law triable by a jury in the federal courts often involve most difficult and complex questions, as, for example, in patent cases at law presenting issues of validity and infringement. See *Tucker v. Spalding*, 13 Wall. 453, 455; *Keyes v. Grant*, 118 U. S. 25, 36, 37; *Royer v. Schultz Belting Co.*, 135 U. S. 319, 325; *Coupe v. Royer*, 155 U. S. 565, 578, 579. Most difficult questions of fact in protracted trials, with much conflicting expert testimony, are not infrequently presented in criminal cases triable by jury. The issue of life or death may be decided in such a case. *We have held that a State may modify a trial by jury or abolish it altogether*, *Walker v. Sauvinet*, 92 U. S. 90; *Maxwell v. Dow*, 176 U. S. 581; *Frank v. Mangum*, 237 U. S. 309, but never that the timehonored method of resolving questions of fact by a jury must be abandoned by a State under compulsion of the Federal Constitution. And we find no warrant for such a ruling now. * * *

In the *United* case, the Supreme Court expressly held that matters of proceedings in the State Courts are local matters, as to which the decision of the local court will be final. On this point the Supreme Court said: (303 U. S. at page 139)

“* * * With respect to the proceedings in the state courts, appellant urges that the case was not tried and determined as required by state law, and we are referred to the state statutes

and the decisions of the Texas courts *as to the proper procedure in the trial court and on appeal. It is not our function, in reviewing a judgment of the state court, to decide local questions.* We are concerned solely with asserted federal rights. The final judgment of the state court in the instant case must be taken as determining that the procedure actually adopted satisfied all state requirements. *John v. Paullin*, 231 U. S. 583, 585; *Lee v. Central of Georgia Ry. Co.*, 252 U. S. 109, 110; *Central Union Co. v. Edwardsville*, 269 U. S. 190, 194, 195. * * *” (Our emphasis)

There is nothing in the decision of the Supreme Court of the United States which would preclude the Court of Civil Appeals, after the remand of the case to it, from setting aside the verdict of the jury, *upon the application of the proper criterion to the evidence.* The Supreme Court of the United States will not pass upon questions of fact which have not been properly passed upon by the State Court from which the appeal is taken. It is sufficient ground for reversal that the evidence has not been considered upon the proper basis. Upon a reconsideration of the case, upon a proper basis, the State court may reach the same result without violating the mandate of the Supreme Court of the United States. *Northern Pacific Railway Company v. Concannon*, 239 U. S. 383; *Sioux City Bridge Company v. Dakota County*, 260 U. S. 441; *Schuylkill Trust Company v. Pennsylvania*, 302 U. S. 506; *Schneider Granite Company v. Gast Realty and Investment Company*, 245 U. S. 288.

The reluctance of the Supreme Court of the United States to pass upon any question which may turn upon an interpretation of a State statute or the State Constitution, is illustrated not only by the cases just cited, but also by decisions by the Supreme Court of the United States, which have been decided since this case was briefed and argued. In *Railroad Commission of Texas v. Rowan and Nichols Oil Company*, 310 U. S. 573; *Railroad Commission v. Rowan and Nichols Oil Company*, 311 U. S. . . . , 61 S. Ct. 343; *Railroad Commission v. Humble Oil and Refining Company*, 311 U. S. . . . , 61 S. Ct. 347; and *Railroad Commission v. Pullman Company*, 311 U. S. . . . , 61 S. Ct. 643, the Supreme Court of the United States refused to pass upon questions of State law, and held that they must be decided by the State courts. In this case, the decision of the Supreme Court of the United States was that the evidence had never been properly passed upon by application of the proper standard of proof. This involved a determination of the validity of the orders under the State statute and the State Constitution, as well as their validity under the Federal Constitution. There were, therefore, State questions to be determined by the State Courts which had not been determined by the application of a proper standard of proof, and under its long established practice, the Supreme Court remanded the case to State Court in order that these questions might first be passed upon by that court by application of the proper criterion.

This Court is therefore incorrect in saying that "if the evidence contained in this record does not

even raise a fact issue to be submitted to the jury, the United States Supreme Court reversed this judgment on an absolutely harmless error * * *." A consideration of the evidence and a determination of the State questions which depended upon such consideration, by the application of a standard requiring segregation, was held to be error by the Supreme Court. Whether it was harmful or harmless, in the sense that an incorrect result was reached, could be determined finally only by a determination of the State questions by the State court, upon the application of the correct standard of proof. *The Supreme Court of the United States did not undertake to pass upon these State questions, but remanded the case in order that the evidence might be given the proper consideration and the State questions determined in the first instance by the State court.*

To say that "if the evidence contained in this record does not even raise a fact issue to be submitted to the jury, the United States Supreme Court reversed this judgment on an absolutely harmless error," begs the question to be decided. It assumes that the Supreme Court of the United States held that where there is any conflict in the evidence on the issue of confiscation, the issue must be submitted to the jury, or, conversely, that the jury's verdict has to be upheld unless *there is no evidence supporting the company's claim of confiscation*. Whether the case should in fact be submitted to the jury in this situation is a State question, not a Federal question. The Supreme Court of the United States did not decide it. The responsibility for deciding it rests

solely upon the State Courts. This responsibility cannot be avoided by seeking to place the responsibility for the decision upon the Supreme Court of the United States, which in no sense undertook to pass upon this question.

If the Supreme Court of the United States had intended to hold that upon a remand, the Court of Civil Appeals had no alternative except to affirm the judgment of the District Court, the Supreme Court would have said so expressly, as it did in reversing the State courts in the cases of *Stanley v. Schwalby*, 162 U. S. 255 and *Tyler v. Magwire*, 17 Wallace, 253. In fact, this court necessarily recognizes the fact that the Court of Civil Appeals was free to reverse the decision of the trial court upon a different ground, by the judgment in this case, which, instead of affirming the decision of the District Court, reverses and remands the case for a new trial.

SECOND ASSIGNMENT OF ERROR

This Court erred in holding that upon an appeal to the District Court under Article 6059, Revised Civil Statutes, the issues of the justice and reasonableness of the order and whether the order is confiscatory must be tried *de novo* as in ordinary civil cases.

The effect of the holding of this Court upon this point is no less than appalling. Not only the parties

to the suit but also the multitude of citizens who pay rates to the Lone Star Gas Company are directly affected. But more than this, the court's decision determines the mode of review of orders and regulations of administrative bodies as to all businesses and industries which the Legislature has found to be affected with a public interest. Its effect is to render futile the hearing before the Railroad Commission and its findings in gas rate orders and other orders of a similar kind. The procedure prescribed by the Legislature in vesting the Railroad Commission with the duty of conducting hearings, making findings, and fixing gas rates, is made a hollow mockery. Duties are imposed upon a court and a jury which are not judicial in their nature, but which are essentially legislative.

The practical nullification of administrative processes which have been found to be necessary by the Legislature in the protection of the public interest, should certainly be avoided unless such a result is compelled by irresistible force of plain statutory provisions or controlling precedents. An examination of this Court's opinion, however, will show that the conclusion reached is contrary to plain statutes and hitherto unquestioned opinions of this court construing such statutes.

The process by which this Court concludes that the trial before the District Court in gas rate matters must be *de novo*, in the sense that the proceedings before, and the findings of, the Railroad Com-

mission must be completely ignored, is fallacious for the following reasons:

First, this Court erroneously states the holding of the Court of Civil Appeals upon the first appeal, by quoting only a part of the Court of Civil Appeals' opinion and wholly omitting that part which states its essential holding upon the extent of the judicial review of orders of the Railroad Commission. While the Court of Civil Appeals uses the phrase, "trial de novo," it obviously uses it to mean merely that the court is not restricted to the record before the Railroad Commission, and that it may hear other evidence offered by any party to the proceeding. That the Court of Civil Appeals did not mean that the hearing before the District Court should be in complete disregard of the proceedings before the Railroad Commission and its findings, is shown by the following quotation from the Court of Civil Appeals opinion, which is not even referred to in this Court's opinion: (86 S. W. (2d) at p. 500)

"* * * But whether the scope of judicial review is a hearing de novo or the correction of nonpermissible error, the appeal is still *merely corrective*. The question is not whether the court, if the order were originally before it, would make the same order as was made by the commission, but only whether the commission has acted reasonably upon sufficient evidence, and whether any substantial right of the complaining party has been infringed. In determining the sufficiency of the evidence under the wider scope of judicial review, the question is

not whether there is a scintilla of evidence to support the order, but *whether the order is fairly and substantially supported by the evidence, when viewed in the light of the presumption in favor of the order, and the quantum and character of the evidence required to overcome such presumption.* * * * (Emphasis ours)

On the same page as the foregoing quotation, the Court of Civil Appeals quotes with approval from the case of *Railroad Commission v. Galveston Chamber of Commerce*, 105 Tex. 101, 145 S. W. 573, in which the Supreme Court said that:

“The language ‘clear and satisfactory evidence’ limits the power of courts in setting aside rates, etc., to cases in which it may be established by *evidence which leaves no reasonable doubt in the judicial mind that the rate or rule is unjust and unreasonable.*” (Our emphasis)

Surely, in view of these statements in the opinion of the Court of Civil Appeals, it is seriously misleading to state that the Court of Civil Appeals, upon the first appeal, held that the District Court had the right to examine the question of the reasonableness of the rates without regard to the record heard by the Railroad Commission and its findings thereon. On the contrary, the Court of Civil Appeals expressly said that the review is “merely corrective” and that where the order is supported by substantial evidence, it must be upheld, even though the evidence upon such issue may be conflicting. So far as the *express language* of the opinion of the Court of Civil Appeals

is concerned, therefore, this Court, by refusing a writ of error upon the first application of the Lone Star Gas Company, did not approve a holding that the trial before the District Court is a trial de novo, in the sense that the trial is without regard to the proceedings before the Commission and its findings. It is only by omitting *the most important part* of the Court of Civil Appeals' opinion that the conclusion could be reached that the Court of Civil Appeals meant that the judicial review could be other than *merely corrective*.

Second, this Court by refusing the writ of error upon the first application by the Lone Star Gas Company, necessarily approved the judgment and opinion of the Court of Civil Appeals, which held that the Court of Civil Appeals had the right to re-examine the evidence, and upon a finding that there was substantial evidence to support the Railroad Commission's order, to reverse the case and render judgment in favor of the Commission. If this Court had thought that the Court of Civil Appeals held that the trial in the District Court must be a de novo trial and that the issues of fact should be submitted to the jury as in any ordinary civil case, then the Court of Civil Appeals would have had no right to reverse and render the case upon conflicting evidence, and this Court would not have then refused the writ of error. It was only upon the assumption that the Court of Civil Appeals had the right to examine the evidence for the purpose of determining whether, as a matter to be determined by the judicial mind, the company had failed to remove all reasonable doubt

as to the reasonableness of the Railroad Commission's order, that the Supreme Court could have refused a writ of error. Otherwise, since the evidence was conflicting, the Court of Civil Appeals would have been required to reverse and remand the case for a new trial, rather than reversing and rendering the case. *Post v. State*, 106 Tex. 500; 171 S. W. 707.

Third, this Court wholly ignores the fact that in approving the opinion of the Court of Civil Appeals in the United Gas Public Service Co. v. State, 89 S. W. (2d) 1094, by refusing writ of error, this Court approved the same holding of the Court of Civil Appeals which it now condemns.

This Court, beginning on page 12 of its opinion, quotes at length from the opinion of the Court of Civil Appeals in this case (129 S. W. (2d) at p. 1176) to show that the Court of Civil Appeals departed from its original opinion in this case. However, the first quotation which is made by this Court in its opinion is a verbatim copy (with the exception of the omission of the word "that" at appropriate places) from the opinion of the Court of Civil Appeals in its opinion in *United Gas Public Service Co. v. State*, 89 S. W. (2d) 1094, at page 1102. We will not here set out this portion of the opinion, but a careful comparison will show that the Court of Civil Appeals in its last opinion copied almost word for word what it said in the *United Gas Public Service Company* case, and which was approved by this Court by refusing a writ of error. Clearly, it is not the Court of Civil Appeals which has changed its views as to

the extent of judicial review. On the contrary, it has faithfully followed its former opinions which were approved by this Court.

Fourth, this Court is able to hold that the review of a rate order of the Railroad Commission in the District Court is a trial de novo, as in any ordinary civil suit, only by wholly ignoring the latest Supreme Court decision under the Railroad rate statute and citing only earlier decisions of the Supreme Court, which, in so far as they may have been in conflict with such decision, were modified or overruled by it. The case we refer to, of course, is the case of *Railroad Commission v. Galveston Chamber of Commerce*, 105 Tex. 101, 145 S. W. 573. Although this decision is later than any of the Supreme Court decisions cited by this Court in its opinion and was written by that very conservative and distinguished Chief Justice, Thomas J. Brown, so far as the opinion of this Court discloses, the opinion was not even considered by this Court in reaching its conclusion. We therefore again respectfully direct this Court's attention to the following language in Chief Justice Brown's opinion: (105 Texas at pages 115, 119)

“ * * * The language, *clear and satisfactory evidence*, limits the power of courts in setting aside rates, etc., to cases in which it may be established by *evidence which leaves no reasonable doubt in the judicial mind* that the rate or rule is unjust and unreasonable. *Willis v. Chowning*, 90 Texas, 617. It is true that this attributes to the work of the Commission a high

degree of verity, but it is the plain language of the law, and is no doubt a wise provision. * * *

“The findings of fact by the trial court have not been objected to. Those facts, in our opinion, wholly fail to meet the requirements of Article 4566, Revised Statutes, that the evidence must show the rate to be unreasonable and unjust beyond a reasonable doubt, and as a matter of law the plaintiffs failed to show any right to a judgment. * * *” (Our emphasis)

If Chief Justice Brown’s opinion is to be taken to mean what it says, the review of a rate order of the Railroad Commission is not a complete trial de novo, as in an ordinary civil suit, and the sole question is whether or not the company has shown beyond a reasonable doubt that the rate order is unreasonable. *Clearly, if an order is not unreasonable, it could not be confiscatory*, under the definition which this Court gives in its present opinion of the meaning of these terms. Therefore, on either issue, if Chief Justice Brown’s opinion is to be followed, the trial is different from an ordinary civil suit in the burden resting upon the person attacking the Railroad Commission’s order. If Chief Justice Brown’s opinion is to be overruled we hope that the Court will frankly say so.

Fifth, this Court’s opinion cannot be justified on the ground of the language of Art. 6059 that the appeal to the District Court shall be “tried and determined as other civil causes in said court.” The Court apparently gives regard to this portion of the stat-

ute, but ignores the portion which says that "the burden of proof shall rest upon the plaintiff, who must show by *clear and satisfactory evidence* that the rates, regulations, orders, classifications, acts or charges complained of are unreasonable and unjust to it or them." As the Court directly held in the case of *Railroad Commission v. Galveston Chamber of Commerce*, 105 Tex. 101, 145 S. W. 573, and as it indicated in the case of *Railroad Commission v. H. & T. C. Ry Co.*, 90 Tex. 340, 38 S. W. 750, while in other respects the case may be tried as ordinary civil cases, the burden of proof resting upon the plaintiff is entirely different. As was said in the case of *Railroad Commission v. H. & T. C. Ry Co.*, *supra*, the evidence must be of "*conclusive character*."

In the case of *Shupee v. Railroad Commission*, 123 Tex. 521, 73 S. W. (2d) 505, the Court held that the provision in Article 911a, Vernon's Annotated Civil Statutes, Section 17, that the action "shall be tried and determined as other civil causes in said court" did not mean that so far as the burden of proof is concerned, the court would try the case as other civil causes, even though the statute contained the further provision that "in all trials under this section the burden of proof shall rest upon the plaintiff who must show *by the preponderance of evidence* that the decisions, rates, regulations, rules, orders, specifications, acts, or charges complained of are unreasonable and unjust to it or them." In the Shupee case the Court, on the contrary, recognized that the decision of the Railroad Commission should be given

effect, unless it is clearly shown to be unsupported by substantial evidence.

Sixth, nor can any distinction be drawn which would be a valid ground for difference in result between the Shupee case and the case of Gulf Land Company v. Atlantic Refining Company, 134 Tex. 59 131 S. W. (2d) 73, on the one hand, and this case, on the other, on the ground that the action of the Railroad Commission in the former is administrative, while its action in this case is legislative. In all of these cases, the Legislature has placed special confidence in the Railroad Commission and has delegated to it the carrying out of the details of general public policies declared by the Legislature. In all of these cases orders fixing rights of particular parties rather than general legislative orders were involved. In the Gulf Land case, the issue of confiscation, by drainage of oil, was involved. All of the orders are prospective in operation; they determine rights to operate busses, to drill an oil well, or to collect a gas rate—all in the future. The only distinctions of importance between the cases are that the order of the Railroad Commission in this case was entered after much more thorough hearing and much more careful findings by the Commission, many more people are directly affected by the order, and the situation is vastly more complicated and requires much greater expert knowledge and consideration, than either a bus or truck permit or a Rule 37 permit. In other words, what this Court seems to regard as "merely administrative" is an order which is of relatively small consequence and more or less routine,

while a legislative order is one of relatively far-reaching importance and one requiring careful investigation, hearings and weighing of diverse factors and considerations. These distinctions, however, we earnestly submit, are reasons for reaching just the *opposite* result from that which the Court reaches.

We think that the Court is correct in saying that a rate order is legislative in character. But if this is true, does it not logically follow that virtually the same test should be applied to determine the validity of the "legislative order" as in determining the validity of a statute? In such cases, this Court has repeatedly held that the validity of a statute is a matter of law for the court, and that the court will not set the statute aside unless its invalidity is established beyond a reasonable doubt. *Brown v. City of Galveston*, 97 Tex. 1, 75 S. W. 488; *Ashford v. Godwin*, 103 Tex. 491, 131 S. W. 535; see 9 Tex. Jur. 478.

Although neither a bus case nor a Rule 37 case is easy to decide, neither is as complex or as difficult as a gas rate case. If any distinction is made, should not the findings and order of the Railroad Commission be given *greater* weight in the cases which require more thorough investigation and more difficult decisions, instead of giving them *no weight at all*, as this Court has held? Must a Rule 37 order, entered after an hour's hearing, be sustained if there is substantial evidence to support it, but a rate order, based on careful findings after months of painstaking hearing, be wholly disregarded and the

question decided "afresh" and "anew" as though the Railroad Commission did not exist? Must an order affecting only one oil well be virtually unchallengeable, but an order affecting hundreds of thousands of gas consumers be subjected to re-examination before a jury without any presumption as to the order's validity?

To ask these questions is to answer them. The Railroad Commission was created to formulate orders and regulations which neither the Legislature nor the courts are suited to handle. The Legislature certainly contemplated that the Railroad Commission should not enter orders without careful hearing and consideration of the evidence, particularly in matters, such as gas rate orders, where hundreds of thousands of people are directly affected. But once such orders are entered, after proper hearings and findings, the Legislature plainly meant that they should be set aside only if they are shown to be unreasonable or unjust by "clear and satisfactory evidence," evidence of a "conclusive character," evidence which "leaves no doubt in the judicial mind." What was farthest from the Legislature's intention was that the Railroad Commission's hearings should be an utter futility and that the matter should be tried "anew" or "afresh" in court, as this Court has held. *There could be no more certain way of completely defeating the legislative will by making the regulation of gas rates a practical impossibility.* This is plain to all men, and we urge the Court to carefully reconsider its opinion before it commits itself irretrievably to so deplorable a result.

We also urge upon the Court the gravity of its holding, from the viewpoint of the *legislative* duties which it imposes upon the court and jury. This court apparently says in its opinion that appeals from *legislative* orders of the Railroad Commission must be tried in the District Court, just like appeals from the Industrial Accident Board (*Zurich General Ins. Co. v. Rodgers*, 128 Tex. 313, 97 S. W. (2d) 675), or from arbitrators (*Schultz & Bro. v. Lempert*, 55 Tex. 273) or from the justice court to the county court in a misdemeanor case. (*Ex parte Morales*, 53 S. W. 107). As we have already pointed out, this makes the Railroad Commission's hearings and findings wholly useless. If the analogy of a workmen's compensation case is followed, the findings and order of the Commission have no weight and cannot even be introduced or referred to before the jury. They are to have no more weight than the award of arbitrators where a right of appeal is reserved, and, as Judge Gould points out in *Schultz & Bro. v. Lempert*, 55 Tex. 273, 277, "the arbitration becomes nothing more than an *experimental attempt to satisfy both parties* * * *." Surely, the Legislature did not intend that the taxpayers money should be wasted on "an experimental attempt to satisfy" the gas company!

But the point we now want to emphasize is that this Court's opinion gives to the District Court "full power to determine the issues and rights of all the parties involved, and to try the case *as if the suit had been filed originally in that court.*" This language would seem to mean that the court has *full power to* determine what rate should be charged by the gas

company. On a trial de novo, in all of the cases cited by this court as analagous, the court has power to enter a judgment which will completely dispose of "the issues and rights of all parties." Can the District Court, therefore, enter a judgment fixing the rate which the gas company may charge? Is the jury empowered to find what is a fair rate, and must the court enter judgment in accordance with the verdict? If so, this Court's opinion would be logically carried out, but we can think of no more glaring attempt to impose *legislative* functions on a court and jury, contrary to the express provisions of Article II, Section 1 of the Constitution of Texas. Heretofore, it has been universally assumed, we believe, that courts will exercise merely corrective jurisdiction over statutes passed by the Legislature or legislative orders passed by bodies to which the Legislature has properly delegated certain functions. But by this opinion, this Court says *all the issues and rights of the parties* shall be tried "anew," as though the whole matter had been initiated in the court.

Not only is the Legislature's intention defeated by an emasculation of the Railroad Commission's power in gas rate cases, but also the Constitution is defied by imposing legislative powers on the court and jury. We earnestly hope that this Court will carefully reconsider its holding before making such a revolutionary doctrine a part of the jurisprudence of this State.

THIRD ASSIGNMENT OF ERROR

This Court erred in holding that the record of the hearing before the Railroad Commission of Texas was not admissible in the trial in the District Court.

In its ruling upon this point, as in its ruling on the question of whether the appeal to the District Court should be tried de novo as any other civil case, this Court ignored the later judicial decisions, while relying on earlier decisions which have been overruled.

The cases cited by this Court in its opinion are *Railroad Commission v. Rau*, 45 S. W. (2d) 413, and *State v. St. Louis Southwestern Railway Company*, 165 S. W. 491. Since these cases involved orders which this court has clasified as "merely administrative," this Court apparently holds that the record before the Commission is not admissible, *even in cases where the order is not legislative but "merely administrative."*

This Court apparently completely overlooked a later decision of the Austin Court of Civil Appeals, which held that it is error to exclude the record of the evidence heard before the Railroad Commission. This was the direct holding of the Court of Civil Appeals in the case of *Empire Gas and Fuel Company v. Railroad Commission of Texas*, 94 S. W. (2d) 1240, *in which writ of error was refused by this Court.* Upon the point of the error of the District Court in refusing to admit the tran-

script of evidence before the Railroad Commission, the Court of Civil Appeals said: (94 S. W. (2d) at pp. 1243, 1244)

“Appellant offered in evidence the recommendation of the deputy supervisor of the commission, who heard the evidence on appellee’s application for its permit, *and also a transcript of the testimony heard by him, duly authenticated by the reporter for the commission, under its allegation that the commission acted without evidence in granting such permit. This evidence was excluded. In this we think the trial court erred.* * * *

“While the transcript of the evidence before the commission would not in and of itself be competent as proof on the issues presented to the trial court, the proceeding there being a trial *de novo*, determinable by competent proof under the rules of evidence, where, as here, it was alleged that the commission acted without evidence, consideration of the record of the hearing before the commission would, it seems to us, be the most practical way of determining that question. * * *” (Emphasis ours)

Conversely, the Court of Civil Appeals has held that the admission of the record of the evidence before the Railroad Commission is not error. In *Turnbow v. Barnsdall Oil Company*, 99 S. W. (2d) 1096, in which case this Court also refused writ of error, the Court of Civil Appeals said: (99 S. W. (2d) at page 1098)

“ * * * On the first question, an examination of the plaintiff's petition discloses an allegation, in addition to want of notice and hearing, that, if such hearing were had, 'there was no evidence introduced at the hearing before the Railroad Commission * * * showing that said two wells, or either of them, were needed to prevent confiscation,' etc. This is the exact question presented, and decided adversely to the Attorney General's contention, in *Empire Gas & Fuel Co. v. Railroad Commission* (Tex. Civ. App.) 94 S. W. (2d) 1420 (writ ref.) and need not be further considered here. * * * ”

In other cases in which writs of error have been refused or dismissed by this Court, the Court of Civil Appeals has held that the record before the Railroad Commission is properly to be considered. In *Humble Oil and Refining Company v. Turnbow*, 133 S. W. (2d) 191, in which this Court refused writ of error and the Supreme Court of the United States denied certiorari, 61 S. Ct. 10, it was held that where the record before the Railroad Commission shows substantial ground for the Commission's action, the Commission's order should be sustained in spite of any contrary evidence introduced in court. Conversely, in the case of *Gulf Oil Corporation v. York*, 134 S. W. (2) 502, (application for writ of error dismissed, correct judgment) it was held that where the record before the Railroad Commission failed to show any substantial evidence to support the action of the Railroad Commission, the order should be set aside, regardless of any evidence that might be heard in the District Court. If the record before the Com-

mission is not even admissible, then surely both of the cases just referred to were erroneously decided.

Even if it is held that the trial in the District Court is essentially *de novo*, it does not necessarily follow that the record of the evidence before the Railroad Commission is inadmissible. The record was introduced in the *United Gas* case, but the Supreme Court of the United States still regarded the trial as *de novo*, for it said: (303 U. S. at page 132)

“* * * The trial was essentially *de novo*. It was begun in March, 1934, and was had before a jury, a motion by the appellants to have the jury discharged and the cause determined by the court being overruled. *The entire record before the Commission was placed in evidence and additional testimony was introduced as to property values, depreciation, reserve accrual, revenues, expenses, rates of return, etc. * * **” (Emphasis ours)

The decision of this Court, in holding that the record before the Railroad Commission is not admissible, removes all incentive of the Railroad Commission to hold a complete and thorough hearing, and also removes all incentive of the interested parties to make a full disclosure of their case before the Railroad Commission to enable it to enter a proper order. Why should the gas company or any other party present any evidence at all at the hearing before the Railroad Commission? On the hearing before the District Court, the company may introduce any evidence which it wishes, and the record before the

Commission is wholly inadmissible either to sustain or to overthrow the Commission's order. The inevitable effect of such a ruling is that the Commission's hearing will be made a mockery, and that the Legislature did a completely futile thing in attempting to provide for gas rate regulations by the Railroad Commission.

CONCLUSION

The issues presented by this case are of vital importance to the parties to the suit, to the hundreds of thousands of gas consumers, and to all future attempts to regulate public utilities and other businesses affected with a public interest. These grave issues have never been argued before the full court which decided this case. In connection with this motion, we therefore respectfully pray that we be permitted to argue this matter orally before the full court.

For the reasons stated, it is respectfully prayed that a rehearing be granted, and that upon such rehearing the judgment heretofore entered by this Court be set aside and that the judgment of the Court of Civil Appeals be in all things affirmed, and for general relief.

Respectfully submitted,

GERALD C. MANN
Attorney General of Texas

GROVER SELLERS
GEO. W. BARCUS
OCIE SPEER
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E. R. SIMMONS
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Assistant Attorneys General
Austin, Texas.

Attorneys for Defendants in
Error.

Copies of this Motion have been mailed to the attorneys of record for the plaintiff in error.

The names and postoffice addresses of the attorneys for the plaintiff in error, upon whom service of this motion may be had, are as follows:

ROY C. COFFEE
MARSHALL NEWCOMB
Dallas, Texas

OGDEN K. SHANNON
Fort Worth, Texas

BEN H. POWELL
BLACK, GRAVES & STAYTON
Austin, Texas

EXHIBIT "K"

No. 7664

**IN THE SUPREME COURT
OF TEXAS**

LONE STAR GAS COMPANY, *Plaintiff in Error*,

vs.

STATE OF TEXAS, ET AL., *Defendants in Error*

From Travis County, Third District

**MOTION FOR REHEARING BY
PLAINTIFF IN ERROR**

May It Please The Court:

Comes now Lone Star Gas Company, plaintiff in error in the above styled and numbered cause, and files this its Motion for Rehearing herein and prays that the judgment of this Court reversing the judgment of the Court of Civil Appeals and remanding the cause to the District Court be set aside and that judgment be entered herein affirming the judgment

of the District Court. In this behalf plaintiff in error submits the following assignments of error:

I.

This Honorable Court erred in approving the holding of the Court of Civil Appeals to the effect that the District Court erred in permitting Ed. C. Connor, a witness for defendants in error, to testify, in effect, that he knew what percentage rate of return had been fixed by the Railroad Commission for gas utilities and that it had never fixed a rate of less than 7%.

II.

This Honorable Court erred in failing to hold, in connection with the question as to the admissibility of the testimony of the witness Connor, that the objections there were directed to the weight rather than the admissibility of said testimony.

III.

This Honorable Court erred, in connection with its discussion as to the admissibility of the testimony of the witness Connor, in approving the holding of the Court of Civil Appeals to the effect that, "so far as the record shows, this was the first pipe line gate rate case the Commission of Texas ever had up to that time," because there is no evidence in the record, one way or the other, in respect to this

matter, and especially no evidence that this was the first gate rate hearing.

IV.

This Honorable Court erred in approving what was held by the Court of Civil Appeals in respect to the admissibility of the testimony of Connor because the objections mentioned in the opinion of the Court of Civil Appeals were not made when the testimony was offered in the District Court.

V.

This Honorable Court erred in approving the holding of the Honorable Court of Civil Appeals to the effect that the District Court erred in refusing to exclude Volumes 7 and 8 of Exhibit 28, presented by the witness Connor; and erred in that connection in approving the holding of the Court of Civil Appeals to the effect that said exhibits were objectionable, they contained the written arguments and self-serving and hearsay declarations of this witness.

VI.

This Honorable Court erred in failing to hold that the admission of said Volumes 7 and 8 of Exhibit 28, as prepared by the witness Connor, was harmless error, if error at all, because Connor was permitted to give the same evidence orally, and the same matter was placed before the jury in his oral testimony

without any objection by the defendants in error.
(S. F. 1189-1198, 1259-1437.)

VII.

This Honorable Court erred in failing to hold that the action of the District Court in admitting said Volumes 7 and 8 of Exhibit 28 was not reversible error.

VIII.

This Honorable Court erred in approving the holding of the Court of Civil Appeals to the effect that the District Court erred in admitting Exhibit 42, prepared by the witness Connor, over the objection that it was self-serving, argumentative and hearsay.

IX.

This Honorable Court erred in failing to hold that the action of the District Court in admitting said Exhibit 42 was not reversible error, if error at all, especially in view of the fact that Connor testified orally, and without objection, in great detail, to the same matters shown in the exhibit.

X.

This Honorable Court erred in approving the holding of the Court of Civil Appeals to the effect that the District Court erred in admitting Exhibits Nos.

4 to 14, prepared by the witness Hulcy, as against the objection that the same were argumentative and self-serving.

XI.

This Honorable Court erred in failing to hold that the action of the District Court in admitting in evidence said Exhibits Nos. 4 to 14, if error at all, was not reversible error, especially in view of the fact that the witness Hulcy was interrogated at great length on direct and cross examination in respect to the matters shown in these exhibits and testified orally and without objection to the same matters.

XII.

This Honorable Court erred in holding that, "as this record stands, the district court must determine the validity or invalidity, of this rate order on conditions as they existed at the very time it was promulgated."

XIII.

This Honorable Court further erred in holding that, "If the Gas Company wishes to contest such order on the ground that it has become invalid since it was promulgated, on account of changed conditions, it must first invoke the jurisdiction of the Commission to pass on that question."

XIV.

This Honorable Court erred in failing to hold that the validity of a rate order must be tested in the light of its prospective operation and that the court called upon to determine the validity of such an order must be empowered to consider how the order affects the property and business of the complainant at the time the case is being tried. This is true because, even if the order at the time it was promulgated would not have yielded a reasonable return, yet, if at the time of the trial it is yielding a reasonable return, it is valid; and, conversely, if at the time it was promulgated it would have yielded a reasonable return, still, if at the time of the trial it is confiscatory in its operation, it is invalid.

A rate order in its very nature is a prediction—a forecast that the prescribed rate will yield a fair return. The forecast must square with the facts as they change in the future. Therefore, in every such case the judicial inquiry must be whether the legislative prediction made by the rate making agency has turned out to be true.

XV.

This Honorable Court erred in holding that when a rate order similar to the one here involved is promulgated and the rate prescribed is reasonable in its operation at that time but later becomes confiscatory, the complaining utility must go back to the Railroad Commission and presents its claim of con-

fiscation to the Commission before resorting to the courts. This holding is erroneous because the question as to whether a rate already prescribed is confiscatory in its operation is a judicial and not a legislative question to be determined by the Railroad Commission. The inquiry conducted by the Railroad Commission to determine what rate should be prescribed for prospective operation is a legislative inquiry. The inquiry that is later conducted in the courts to determine whether a rate is unreasonable or unjust or confiscatory in its operation is a judicial inquiry. The Court erred in holding that in such circumstances the utility must go back to the Railroad Commission because the Railroad Commission is without power to determine the judicial question as to whether the rate is confiscatory.

XVI.

This Honorable Court erred (we assume through inadvertence) in the following part of its opinion:

“If a rate order merely fails to yield a fair profit or return, it is unreasonable and unjust, but not confiscatory. If it will not only not yield a fair profit or return, but calls on the utility to operate at a loss, it is confiscatory.” (Opinion, p. 24.)

Here the Court has clearly erred. A rate that fails to yield a fair return on the fair value of the utility's property at the time it is being used in the public service is not only unreasonable and unjust

but is confiscatory. And to establish confiscation it is not necessary to prove that the prescribed rate "calls on the utility to operate at a loss." It is enough that it deprives the utility of a fair return on the fair value of its property. In *Board of Commissioners v. N. Y. Telephone Co.*, 271 U. S. 23, 31, the Supreme Court said:

"The just compensation safeguarded to the utility by the Fourteenth Amendment is a reasonable return on the value of the property used at the time that it is being used for the public service. And rates not sufficient to yield that return are confiscatory. *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 41; *Bluefield Co. v. Public Service Commission*, 262 U. S. 679, 692." (At p. 31.)

The same ruling was made by the Supreme Court of the United States in this case when it was before it (304 U. S. 224, 231). The trial court had defined an unreasonable and unjust rate as being one that was "so low as to have not provided for a fair return upon the fair value of defendant's property," and the Supreme Court in the opinion of Chief Justice Hughes held that such a rate was not only unreasonable and unjust but was confiscatory; and the Court in that connection referred to its holding in respect to the same definition in *United Gas Public Service Co. v. Texas*, 303 U. S. 123.

The Court has thus interpreted the opinion of Chief Justice Hughes (this Court's opinion, pp. 11, 29).

If the statement made in the Court's opinion were correct and Article 6059 did not exist, a gas utility could be compelled to render service under rates yielding no return above operating costs or yielding a return less than a fair return. Under such a rule, a gas utility's right to a fair return on the fair value of its property would derive from, not the Fourteenth Amendment, but Article 6059. And if that article did not exist, the right to be protected in a fair return would not exist. The Supreme Court has held that this right is safeguarded to the utility by the Fourteenth Amendment. *Board of Commissioners v. N. Y. Telephone Co. supra.*

We respectfully request that this part of the opinion be corrected so as to define a confiscatory rate in the way the same was defined in the charge of the District Court, approved by this Court and by the Supreme Court of the United States.

Plaintiff in error is preparing and will separately file an argument in support of this motion and it prays that the argument be considered in connection with the motion.

The defendants in error are represented herein by their attorneys of record, Honorable Gerald C. Mann, Attorney General of Texas, and Honorable James P. Hart, Morris C. Hodges, A. S. Rollins, and George W. Barcus, Assistants to the Attorney General, all of whom reside at Austin, Texas, upon whom service of this motion may be had.

Wherefore, plaintiff in error Lone Star Gas Company prays that this Motion for Rehearing be granted and that on rehearing the judgment of the Court of Civil Appeals be reversed and that of the District Court affirmed; and for general relief.

Respectfully submitted,

ROY C. COFFEE,
MARSHALL NEWCOMB,
Dallas, Texas,

OGDEN K. SHANNON,
Fort Worth, Texas,

BEN H. POWELL,
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Attorneys for Plaintiff in
Error

Lone Star Gas Company

Filed May 15, 1941.

EXHIBIT "L"

**CLERK'S OFFICE,
SUPREME COURT OF TEXAS**

**ORDERS OF SUPREME COURT OVERRULING
MOTIONS FOR REHEARING**

July 16, 1941

MOTION NO. 15,031.

LONE STAR GAS COMPANY

v.

**STATE OF TEXAS ET AL
From Travis County 3rd District**

The motion for rehearing filed herein by the Plaintiff in Error, having heretofore been submitted to the Court, and after due consideration of same, it is ordered that the said motion be, and is hereby, overruled.

MOTION NO. 15,034 •

LONE STAR GAS COMPANY

v.

STATE OF TEXAS, ET AL
From Travis County, 3rd District

The motion for rehearing filed herein by the Defendants in Error, having heretofore been submitted to the Court, and after due consideration of same, it is ordered that the said motion be, and is hereby, overruled.